APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Karen Leclerc; Guillaume Jarry;
Beatrice Boulord; Maureen D. Affleck,
Plaintiffs - Appellants - Cross Appellees,

v.

Daniel E. Webb, et al.,
Defendants

Daniel E. Webb; Harry J. Phillips, In Their Respective
Official Capacities as Chairman and Vice-Chairman of the
Louisiana Committee on Bar Admissions;
Jeffrey P. Victory; Jeannette Theriot Knoll;
Chet D. Traylor; Catherine D. Kimball, a/k/a Kitty Kimball;
John L. Weimer; Bernette Joshua Johnson, In Their
Official Capacities as Justices of the Louisiana
Supreme Court,
Defendants - Appellees - Cross Appellants.

Docket No. 03-30752

Caroline Wallace; Emily Maw,
Plaintiffs - Appellees,

v.

Pascal F. Calogero Jr., in his official capacity as
Chief Justice of the Louisiana Supreme Court;
Jeffrey P. Victory; Jeannette Theriot Knoll;
Chet D. Traylor; Catherine D. Kimball; John L. Weimer;
Bernette J. Johnson, in their official capacities as
Justices of the Louisiana Supreme Court;
Daniel E. Webb; Harry J. Phillips, Jr., in their

respective official capacities as Chairman and
Vice-Chairman of the Louisiana Committee on Bar
Admissions,
Defendants - Appellants

Docket No. 03-31009

July 29, 2005

Appeals from the United States District Court
for the Eastern District of Louisiana

Before JONES, SMITH, and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This appeal arises from two consolidated actions filed by nonimmigrant aliens whose status, according to Louisiana Supreme Court Rule XVII, § 3(B), renders them ineligible to sit for the Louisiana Bar.[1] The district courts disagreed whether the Louisiana rule impermissibly discriminates against the plaintiffs in violation of the Equal Protection Clause. Because the level of constitutional protection afforded nonimmigrant aliens is different from that possessed by permanent resident aliens, we hold that the Louisiana rule survives rational basis review.

BACKGROUND

I. Louisiana Bar Rule

Louisiana Supreme Court Rule XVII, § 3(B) ("Section 3(B)") requires that "[e]very applicant for admission to the

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[1] *LeClerc, et al. v. Webb, et al.*, 270 F. Supp. 2d 779 (E.D. La. 2003), and *Wallace, et al. v. Calogero, et al.*, 286 F. Supp. 2d 748 (E.D. La. 2003). We consolidated these cases for purposes of this appeal.

Bar of this state shall . . . [b]e a citizen of the United States or a resident alien thereof." Prior to the adoption of Section 3(B), Louisiana precedent defined "resident alien" as a "foreign national[] lawfully within the United States." *In re Appert*, 444 So. 2d 1208 (La. 1984). In 2002, the Louisiana Supreme Court overturned *Appert*, and held that the term "resident alien . . . appl[ies] only to those aliens who have attained permanent resident status in the United States." *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002). As interpreted in *Bourke*, Section 3(B) effectively prohibits the instant plaintiffs — nonimmigrant aliens[2] who are "not entitled to live and work in the United States permanently" — from sitting for the Louisiana Bar. *Bourke*, 819 So. 2d at 1022.

II. The *LeClerc* Plaintiffs

The *LeClerc* plaintiffs, Karen LeClerc, Guillame Jarry, Beatrice Boulord, and Maureen Affleck, are nonimmigrant aliens who hold degrees from foreign law schools and seek leave to sit for the Louisiana Bar. LeClerc and Jarry are French citizens admitted to the United States on J-1 student visas.[3] Boulord, also a French citizen, was initially admitted

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[2] The Immigration and Nationality Act distinguishes between immigrant and nonimmigrant aliens, negatively defining an immigrant alien as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." 8 U.S.C. § 1101(a)(15) [IMMLS PSD INA § 101]. An alien falling into one of fifteen exclusionary categories is a nonimmigrant alien, a class generally delimited by a lack of intention to abandon his foreign country residence and entry into the United States for specific and temporary purposes.

[3] Title 8 U.S.C. § 1101(a)(15)(J) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> having a residence in a foreign country which he has no intention of abandoning who is a bona fide student . . . is coming temporarily to the United States as a participant in a program . . . for the purpose of . . . studying . . . .

to the United States on a J-1 student visa, but currently remains in the United States on a H-1B temporary worker visa.[4] Affleck is a Canadian citizen initially admitted to the United States on an L-2 spousal visa,[5] but currently remains in the United States on an H-1B temporary worker visa.

As graduates of foreign law schools seeking permission to sit for the Louisiana Bar, each plaintiff was required to apply for an equivalency determination pursuant to Louisiana Supreme Court Rule XVII, § 6 ("Section 6").[6] Before the commencement of the *LeClerc* suit, Affleck applied for, and

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[4] Title 8 U.S.C. § 1101(a)(15)(H)(i)(b) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> is coming temporarily to the United States to perform services . . . in a specialty occupation . . . having residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee . . . in a training program that is not designed primarily to provide productive employment . . . .

Pursuant to the 1990 Act, an H-1B visa holder is no longer required to maintain "a temporary residence abroad which he or she has no intention of abandoning." *Steel on Immigration*, §3:13, 3-35. Nor is such a visa holder subject to the presumption of immigrant status. 8 U.S.C. § 1184(b). However, the nature of an H-1B visa holder's status in the United States is still temporary, the visa holder is still subject to a six-year admission cap (three years admission plus three years extension) notwithstanding, *inter alia*, a change in status. *Steel*, at 3:13, 3-73-74.

[5] Title 8 U.S.C. § 1101(a)(15)(L) [IMMLS PSD INA § 101], derivatively admits a nonimmigrant "alien spouse and minor child[] of [an L-1] alien."

[6] LR XVII, § 6 provides that:

> "An applicant who has graduated from a law school that is not located in the United States or its territories must submit an application for the Committee for an equivalency determination . . . ."

was denied an equivalency determination because her status did not comply with Section 3(B). The other plaintiffs filed for equivalency determinations after the suit commenced and were similarly refused. None of the plaintiffs appealed their equivalency denials as permitted by Louisiana Supreme Court Rule XVII, § 9 ("Section 9").[7]

On March 6, 2003, the plaintiffs filed suit, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1367, against the Louisiana Supreme Court[8] and the Chairman[9] and Vice-Chairman[10] of the Louisiana Committee on Bar Admissions (collectively "defendants") in their official capacities. The plaintiffs challenged the enforcement of Section 3(B) and sought declaratory and injunctive relief and attorneys' fees. They requested expedited discovery related to the adoption of Section 3 B), including records of the Louisiana Supreme Court's official meetings, processes, and opinions. The defendants moved to quash the plaintiffs' discovery requests, asserting judicial and legislative immunity. Finding the defendants judicially immune, a magistrate judge granted the motion. On April 17, 2003, the plaintiffs moved for summary judgment, and the defendants countered with a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim based, *inter alia*, on standing, ripeness, Eleventh Amendment, judicial and legislative immunity, and abstention grounds.

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[7] LR XVII, § 9 provides that:

> Upon notice . . . that applicant has failed to fulfill one or more of the requirements of . . . Section 6, . . . , the applicant may appeal by petition directly to the Court.

[8] Pascal F. Calogero, Jr., Jeffrey P. Victory, Jeanette T. Knoll, Chet D. Traylor, Catherine D. Kimball, John L. Weimer, and Bernette J. Johnson. The *LeClerc* plaintiffs did not name the Honorable Pascal F. Calogero, Jr., the lone dissenter in *Bourke*.

[9] Daniel A. Webb.

[10] Harry J. Phillips.

The district court partially granted the defendants' motion to dismiss, denied the plaintiffs' motion for summary judgment, and denied as moot the plaintiffs' appeal of the magistrate judge's discovery ruling.[11] While rejecting the defendants' jurisdictional arguments, the court held on the merits that: (1) Section 3(B) is not preempted by federal immigration for trade policy; (2) Affleck lacked standing to assert a claim under NAFTA;[12] (3) the plaintiffs failed to state a claim for violation of either procedural or substantive Due Process; and (4) applying rational basis review, Section 3(B) is rationally related to legitimate state interests, and, thus, constitutional. The district court denied plaintiffs' motion to reconsider on July 30, 2003.[13] Both parties timely noticed their appeals and cross-appeals.

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[11] The *LeClerc* plaintiffs appeal the discovery ruling, which this Court reviews for abuse of discretion. *In re Grand Jury Proceedings*, 115 F.3d 1240, 1243 (5th Cir. 1997). Because the plaintiffs' discovery requests border on the absurd, we find no such abuse.

[12] We affirm this ruling. As conceded in oral argument, Affleck, although a Canadian citizen, is not a beneficiary of NAFTA. Moreover, NAFTA limits enforcement to the Secretary of State and the United States Attorney General. Thus, even if a beneficiary of the treaty, Affleck has no private right of action thereunder.

[13] The plaintiffs appeal this ruling. We AFFIRM. We review a district court's denial of a motion for reconsideration for abuse of discretion. *Westbrook v. C.I.R.*, 68 F.3d 868, 879 (5th Cir. 1995). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments. *Westbrook*, 68 F.3d at 879. In their motion, not only did plaintiffs improperly re-argue the merits of their case, they also impermissibly asserted, for the first time, arguments under the General Agreement on Trade and Services ("GATS"), the Dormant Commerce Clause, and the right to travel. As such, we find no abuse of discretion in the court's denial on the basis of

III. The *Wallace* Plaintiffs

The *Wallace* plaintiffs' suit landed before a different federal district judge in New Orleans. Caroline Wallace and Emily Maw are nonimmigrant aliens who seek leave to sit for the Louisiana bar exam. Both are citizens of the United Kingdom who were admitted to the United States on temporary visas. Wallace holds an H-1B temporary worker visa and is licensed as an attorney in England and Wales. Wallace is currently employed doing non-attorney legal work. Maw was admitted to the United States pursuant to an F-1 student visa[14] and remains on an H-1B temporary worker visa.[15] Maw holds a law degree from Tulane University Law School in New Orleans and is currently employed as a paralegal.

Before filing suit, Wallace applied for an equivalency determination, and avers that after she was initially granted permission to sit for the Bar, permission was revoked for her noncompliance with Section 3(B). Although the record is unclear, Maw either applied to sit for the Bar exam or moved for admission by reciprocity. Either way, the defendants de-

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these errors. Moreover, having been improperly raised below, we will not consider on appeal the GATS, Dormant Commerce Clause, or right to travel arguments advanced by the plaintiffs.

[14] Title 8 U.S.C. § 1101(a)(15)(F) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> ha[s] a residence in a foreign country which he has no intention of abandoning, is a bona fide student qualified to pursue a full course of study and [] seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . .

[15] At oral argument, counsel represented that Maw is now an H-1B visa holder.

nied her application for lack of Section 3(B) qualification.[16] Neither plaintiff appealed her denial to the Louisiana Supreme Court pursuant to Rule 9.

On May 2, 2003, the plaintiffs filed a suit against the defendants, which is parallel in all relevant respects to the *LeClerc* action. However, their motion to consolidate their action with the *LeClerc* suit was inexplicably denied. Cross-motions for judgment followed as in *LeClerc*, but with different results.

The *Wallace* district court denied the defendants' motion to dismiss and partially denied the plaintiffs' motion for summary judgment. Like the *LeClerc* court, the *Wallace* court rejected the defendants' jurisdictional arguments. The court dismissed the plaintiffs' preemption claim, but denied their Due process Claim as moot. On the plaintiffs' Equal Protection claim, however, the court applied strict scrutiny review and held that because Section 3(B) is not the least restrictive means to achieve the state's asserted compelling interests, it is unconstitutional. Defendants timely noticed their appeal.

The two cases are consolidated on appeal in this court. Because the issues raised are nearly identical, any references to plaintiffs in the following discussion include, unless otherwise noted, the *LeClerc* and *Wallace* plaintiffs.

STANDARD OF REVIEW

We review *de novo* a district court's Rule 12(b)(1) (motion to dismiss for lack of subject matter jurisdiction), Rule 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted), and Rule 56 (motion for summary judgment) dispositions, applying the same standards as

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[16] Sometime after this suit commenced, Maw took and passed the Louisiana Bar exam. Her admission to the Bar is stayed pending the outcome of this case.

the district court. *Bombardier Aerospace v. Ferrer, Poirot & Wansbrough, P.C.*, 354 F.3d 348, 352 (5th Cir. 2003).

DISCUSSION

A. Federal Jurisdiction

The defendants maintain that the plaintiffs lack standing and present unripe claims. They further assert judicial and legislative immunity from the *LeClerc* and *Wallace* suits pursuant to precedent and the Federal Courts Improvement Act of 1996 ("FCIA"), 42 U.S.C. § 1983.[17]

Standing and ripeness are two doctrines of justiciability that assure federal courts will only decide Article III cases or controversies. To achieve standing, a plaintiff must have suffered an injury in fact, *see Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2308, 159 L.Ed.2d 98 (2004), and generally, "must submit to the challenged policy" before pursuing an action to dispute it. *Ellison v. Connor*, 153 F.3d 247, 254-55 (5th Cir. 1998). However, strict adherence to the standing doctrine may be excused when a policy's flat prohibition would render submission futile. *Ellison*, 153 F.3d at 255 (citing *Moore v. United States Dept. of Agric.*, 993 F.3d 1222 (5th Cir. 1993)). The ripeness doctrine counsels against "premature" adjudication by distinguishing matters that are "hypothetical" or "speculative" from those that are poised for judicial review. *United Trans. Union*, 205 F.3d at 857. Even actions for declaratory relief, which by design permit pre-enforcement review, require the presence

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[17] Because federal jurisdiction cannot be waived or assumed, *Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 207 (5th Cir. 1994), we address the defendants' jurisdictional arguments briefly even though they appeared to abandon these jurisdictional contentions at oral argument. *See United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (discussing the Court's obligation to independently examine its jurisdiction despite party concessions).

of an actual "case" or "controversy." *Id.* A pre-enforcement action "is generally ripe if any remaining questions are purely legal . . . [and] further factual development" is not required for effective judicial review. *Id.*

Both the futility exception to the standing doctrine and the pre-enforcement variance to the ripeness doctrine apply here. Strict compliance with the standing doctrine would have required each plaintiff (except Maw) to apply for an equivalency determination under Section 6 of the Louisiana Bar Rules before filing suit. Strict compliance with the ripeness doctrine would have required each plaintiff to file a Section 9 appeal of his or her equivalency denial or rejection prior to filing suit. All but two plaintiffs, Affleck and Wallace, failed to comply with Section 6, and none complied with Section 9.

Nevertheless, given Affleck's equivalency denial after her timely application, Wallace's equivalency revocation, and Section 3(B)'s prohibition against the admission of non-immigrant aliens, as interpreted in *Bourke*, there is no reason to believe that the plaintiffs who failed to submit to Section 3(B) by filing timely Section 6 applications would have experienced different outcomes. The non-conforming plaintiffs' submission would have been a futility for standing purposes.[18] Likewise, the plaintiffs' failure to avail themselves of Section 9 is excused because the aforementioned facts undermine the utility of further factual development, leaving only pure legal questions for adjudication. The plaintiffs thus have standing and have asserted claims that are ripe for adjudication.

Next, rejecting the defendants' immunity defenses, we find that they are amenable to the instant suits. When acting

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[18] Although Maw's current status – having been permitted to take the Louisiana Bar – complicates this issue, the totality of the plaintiffs' experiences weigh in favor of a futility finding.

in its enforcement capacity, the Louisiana Supreme Court, and its members, are not immune from suits for declaratory or injunctive relief. *See Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719, 100 S. Ct. 1967 (1980) (holding that the Virginia Supreme Court and its chief justice may be sued for acts committed in their enforcement capacities). Moreover, the FCIA of 1996 only precludes injunctive relief for suits against a judicial defendant acting in his "judicial capacity."[19] Thus, to the extent that the plaintiffs seek declaratory and injunctive relief against the *enforcement* of Section 3(B) only, the court and its individual members are subject to the instant suits.

B. Merits

Plaintiffs contend that Section 3(B) violates their rights under the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment,[20] and the Supremacy Clause of Art. VI, cl. 2. Each contention will be discussed in turn.

1. Equal Protection

The plaintiffs first advance arguments based on every conceivable level of Equal Protection analysis, contending that: (1) under *In re Griffiths*,[21] nonimmigrant aliens are a

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[19] Title 42 U.S.C. § 1983 provides that:

> [I]n any action brought against a judicial officer for an act or omission taken in such officer's *judicial capacity*, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

(emphasis added) (amended Oct. 19, 1996 by Pub. L. 104-317, Title III § 309(c), 110 Stat. 3853).

[20] Only the *LeClerc* plaintiffs assert a Due Process violation on appeal.

[21] 413 U.S. 717, 93 S. Ct. 2851 (1973).

suspect class and state laws affecting them are subject to strict scrutiny; (2) in the alternative, nonimmigrant aliens are a quasi-suspect class and states laws affecting them are subject to intermediate scrutiny; and (3) in the alternative, if nonimmigrant aliens are not a suspect class at all, state laws affecting them are subject to rational basis review. Plaintiffs maintain that Section 3(B) fails under any of these three tests. Despite some ambiguity in Supreme Court precedent, we conclude that because Section 3(B) affects only nonimmigrant aliens, it is subject to rational basis review.

To begin, nonimmigrant aliens are not a suspect class under *Griffiths*. The plaintiff in *Griffiths* was a permanent resident alien, who, but for a Connecticut law that conditioned bar admission on United States citizenship, would have been eligible to sit for the Connecticut bar exam. 413 U.S. at 718, 93 S. Ct. at 2853. The instant plaintiffs, however, are *nonimmigrant aliens*. The distinction, far from being a "constitutional irrelevancy,"[22] is paramount.[23] Section 3(B) only affects nonimmigrant aliens who are "not entitled to live and work in the United States permanently." *Bourke*, 819 So. 2d at 1022. In contrast, the rule at issue in *Griffiths* effected a "total exclusion [of all] aliens from the practice of law" in Connecticut. *Griffiths*, 413 U.S. at 719, 93 S. Ct. at 2853. It

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[22] *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 469, 105 S. Ct. 3249, 3269 (1985) (stating that "*Plyler*, for example, held that the status of being an undocumented alien is not a 'constitutional irrelevancy,' and therefore declined to review with strict scrutiny classifications affecting undocumented aliens").

[23] *See generally*, David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of *Zadvydas v. Davis*, 2001 Supreme Court Review 47, esp. at 48, 86-87, 92-97, 107 (". . . I believe that the categorical approach still holds up and justifies a major distinction between LPRs [lawful permanent residents] and other aliens for constitutional purposes.").

was this "wholesale ban" of aliens from the Connecticut Bar that the Supreme Court found constitutionally infirm. *Id.* at 725 93 U.S. 2856. Moreover, as elaborated below, the Court took pains to categorize the ways in which resident aliens share essential benefits and burdens of citizenship, *see id.* at 722, 93 S. Ct. at 2855, in a way that aliens with lesser legal status do not.

Thus far, the Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens. As the highest level of Equal Protection analysis, strict scrutiny is employed when a governmental body creates a classification that burdens a fundamental right[24] or targets a suspect class. *Regents of University of California v. Bakke*, 438 U.S. 265, 357, 98 S. Ct. 2733, 2782 (1978). Although classifications based on alienage are inherently suspect and subject to close judicial scrutiny as a general matter, the Court's decisions have "never suggested that such legislation is inherently invalid, nor [has the Court] held that all limitations on aliens are suspect." *See Foley v. Connelie*, 435 U.S. 291, 294, 98 S. Ct. 1067, 1070 (1978) (internal citation omitted).

Beginning in 1971, the Court has applied some variation of strict scrutiny to invalidate state laws affecting "resident aliens" or "permanent resident aliens." *See Graham v. Richardson*, 403 U.S. 365, 371, 91 S. Ct. 1848, 1951 (1971) (applying "strict judicial scrutiny" and striking state laws that denied "resident aliens" disability benefits).[25] The Court has

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[24] The practice of law is not a fundamental right assert able by the plaintiffs, discussed *infra*.

[25] *See also Griffiths, supra* (applying "close judicial scrutiny"); *Exam. Bd. Eng'rs v. De Otero*, 426 U.S. 572, 602, 96 S. Ct. 2264, 2281 (applying "strict judicial scrutiny" and striking a law of Puerto Rico that prevented "resident aliens" from obtaining engineering licenses); *Nyquist v. Mauclet*, 432 U.S. 1, 7, 97 S. Ct. 2120, 2124 (1977) (applying "close judicial scrutiny" and striking

never applied strict scrutiny review to a state law affecting any other alienage classifications, *e.g.*, illegal aliens, the children of illegal aliens, or nonimmigrant aliens. In such cases, the Court has either foregone Equal Protection analysis, *see Toll v. Moreno*, 458 U.S. 1, 102 S. Ct. 2977 (1982) (non immigrant G-4 aliens); *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976) (illegal aliens),[26] or has applied a modified rational basis review, *see Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982) (children of illegal aliens). In the latter case, *Plyler*, the Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens. *See Plyler*, 457 U.S. at 224, 102 S. Ct. at 2398 ("[the Texas law] can hardly be considered rational unless it furthers some *sub-*

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a state law that prevented "permanent resident aliens" from receiving state financial assistance for higher education). These cases, especially *Graham*, follow from the Court's 1948 decision in *Takahashi v. Fish and Game Comm'n*, wherein the Court invalidated, on Supremacy Clause grounds, a California law that prevented resident aliens ineligible for citizenship from obtaining state fishing licenses as inconsistent with Congressional determination to admit such aliens without burden or restriction. 334 U.S. 410, 419, 68 S. Ct. 1138, 1142 (1948).

[26] *Toll* involved a University of Maryland policy that denied in-state tuition fees to domiciled G-4 nonimmigrant aliens and their dependents. The Court invalidated the policy on Supremacy Clause grounds, discussed *infra*, and expressly declined to reach the nonimmigrants' Due Process and Equal Protection claims. *Toll*, 458 U.S. at 9-10, 102 S. Ct. at 2982. In *DeCanas*, the Court reviewed a California law that prohibited the knowing employment of illegal aliens where such would adversely affect resident alien workers. The Court upheld the state law on Supremacy Clause grounds, discussed *infra*. *DeCanas*, 424 U.S. at 354-363, 96 S. Ct. at 936-940. In both *Toll* and *DeCanas*, the Court addressed state laws that not only affected but also drew distinctions among aliens in formulating state policies, yet in neither case did the Court employ Equal Protection analysis.

stantial goal of the State.") (emphasis added).[27] Yet, while adopting a *sui generis* level of rational basis review, the Court acknowledged that the immigration status of the affected class of aliens precluded use of either intermediate or strict scrutiny review.[28]

The development of this jurisprudence is consistent with the Court's fundamental rationale for applying strict scrutiny review exclusively to resident aliens: "[T]he state laws at issue in *Graham*, *Nyquist*, *de Otero*, and *Griffiths* warranted close judicial scrutiny because they took position[s] seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*." *See Foley*, 435 U.S. at 295, 98 S. Ct. at 1070 (emphasis added). The Court has uniformly focused on two conditions particular to resident alien status in justifying strict scrutiny review of state laws affecting resident aliens: (1) the inability of resident aliens to exert political power in their own interest given their status as

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[27] The compromised level of rational basis review is recognized in the concurring opinion of Justice Powell, *id.* at 238, 102 S. Ct. at 2406 (approving the heightened rational basis analysis in the "unique circumstances" of this case), and the dissenting opinion of Justice Burger, *id* at 244, 102 S. Ct. at 2409, (disagreeing that the unfortunate circumstance of illegal alien children entitles them to "special solicitude under the Equal Protection Clause").

[28] In determining that proper level of review to apply in that case, the Court stated:

> Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.

Plyer, 457 U.S. at 223, 102 S. Ct. at 2398. *See id.* at 218, n.16, 102 S. Ct. at 2395, n.16 (discussing but not applying intermediate scrutiny review).

virtual citizens; and (2) the similarity of resident aliens and citizens.

Given the extent to which resident aliens are legally entrenched in American society, their inability to participate in the political process qualifies them as "a prime example of a discrete and insular minority for whom [] heightened judicial solicitude is appropriate." *See Griffiths*, 413 U.S. at 721, 93 S. Ct. at 2854-55 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4, 58 S. Ct. 778, 783-84,n.4 (1938)).[29] Characterizing resident aliens as a *Carolene Products* minority reconciles the breadth of rights and responsibilities they enjoy with their lack of political capacity.[30] Contrary to the plaintiffs' contention, nonimmigrant aliens — who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here — need not be accorded the extraordinary protection of strict scrutiny by virtue of their

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[29] *See also Graham*, 403 U.S. at 373, 91 S. Ct. at 1852; *Griffiths*, 413 U.S. at 721, 93 S. Ct. at 2854-55; *Nyquist*, 432 U.S. at 17, 97 S. Ct. at 2129. *See also Bakke*, 438 U.S. at 290, 98 S. Ct. at 2748 (stating that *Carolene Products* insularity "may be relevant in deciding whether or not to add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination").

[30] In Foley, the Court stated that:

> beginning with a case which involved the denial of welfare assistance essential to life itself, the Court has treated certain restrictions on aliens with "heightened judicial solicitude," *Graham v. Richardson*, 403 U.S. 365, 372 91 S. Ct. 1847, 1852 (1971), a treatment deemed necessary since aliens – pending their eligibility for citizenship – have no direct voice in the political processes. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153, 58 S. Ct. 778, 783-784 (1938).

435 U.S. at 294, 98 S. Ct. at 1070 (citation marks edited).

alien status alone.[31] Nonimmigrant aliens may, of course, qualify for anti-discrimination protection based upon race, sex, national origin and religious adherence, just as they may otherwise enjoy the benefits of American law.[32] But their lack of legal capacity, unlike that of immigrant aliens, is tied to their temporary connection to this country. Moreover, the numerous variations among nonimmigrant aliens' admission status make it inaccurate to describe them *as a class* that is "discrete" or "insular."[33] Nonimmigrant aliens, in short, do not warrant *Carolene Products* status.

The Court's treatment of resident aliens also rests upon pragmatic recognition that resident aliens are similarly situated to citizens in their economic, social and civic (as opposed to political)[34] conditions. In *Griffiths*, the Court observed:

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[31] *Cf.*, Lea Brilmayer, *Carolene, Conflicts and the Fate of the "Inside-Outsider,"* 134 U. Pa. L. Rev. 1291 (1986).

[32] *See e.g.*, 8 U.S. C. § 1324(b) (prohibiting "unfair immigration-related employment practice.").

[33] The Court makes this very point in *Toll*, stating that:

> We noted that as to some categories of nonimmigrant aliens [B, F, and H visa holders], Congress had expressly conditioned admission . . . on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States . . . . With respect to G-4 nonimmigrant aliens, however, we concluded that Congress had deliberately declined to impose restrictions on intent, thereby permitting them to adopt the United States as their domicile.

458 U.S. at 7, n.8, 102 S. Ct. at 2980, n.8 (internal marks and citations omitted).

[34] The Court has expressly declined to extend politically-oriented rights and opportunities to aliens. *See Foley*, 435 U.S. 291, 98 S. Ct. 1067 (applying rational basis review and upholding a state law that conditioned employment as a state trooper on citizenship be-

> Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in a myriad of other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

Griffiths, 413 at 722, 93 S. Ct. at 2855.[35] Like citizens, resident aliens may not be deported, are entitled to reside permanently in the United States,[36] may serve, voluntarily or by

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cause the law implicated rights of governance); *Cabell v. Chavez-Salido*, 454 U.S. 432, 444-47, 102 S. Ct. 735, 742-44 (1982) (applying "lower level scrutiny" and extending *Foley* to uphold a state law conditioning employment as a probation officer on citizenship).

[35] *See also Graham*, 403 U.S. at 376, 91 S. Ct. at 1854 ("Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within the United States for many years, work in the State and contribute to the economic growth of the State. There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of a state"); *Mathews v. Diaz*, 426 U.S. 67, 83, 96 S. Ct. 1883, 1893, 48 L.Ed.2d 478 (1976) ("citizens and those who are most like citizens qualify. Those who are less like citizens do not."); *Nyquist*, 432 U.S. at 12, 97 S. Ct. at 2126-27 ("Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis.").

[36] Title 8 U.S.C. § 1101(a)(20) provides that:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

conscription, in the military,[37] are entitled to state aid benefits,[38] and pay taxes on the same bases as citizens.[39]

Nonimmigrant aliens' status is far more constricted than that of resident aliens. Nonimmigrant aliens are admitted to the United States only for the duration of their status,[40] and on the express condition that they have "no intention of abandoning" their countries of origin and do not intend to seek permanent residence in the United States.[41] They are admitted, remain, and must depart at the discretion of the Attorney General.[42] Plaintiffs acknowledge that nonimmigrant

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[37] Title 10 U.S.C. § 3253 provides that:

> In time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

See also 10 U.S.C. § 8253 (same).

[38] *Graham*, 403 U.S. at 371, 91 S. Ct. at 1851; *Nyquist*, 432 U.S. at 12, 97 S. Ct. at 2127.

[39] Pursuant to the U.S. Tax Guide for Aliens "Resident aliens generally are taxed on their worldwide income, the same as U.S. citizens." IRS Pub. 519, 2003 WL 23305933 (I.R.S.).

[40] 8 C.F.R. § 214.2(f)(5)(I) provides that:

> [d]uration of status is defined as the time during which an F-1 student is pursuing a full course of study at an educational institution . . . .

[41] 8 U.S.C. §§ 1101(a)(15)(F), (H), (J); *Steel* at §3:11, 3-35.

[42] Title 8 U.S.C. § 1227(a)(1)(C) provides that:

> Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if . . . . alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this

aliens may not serve in the U.S. military,[43] are subject to strict employment restrictions,[44] incur differential tax treatment[45] and may be denied federal welfare benefits.[46] Finally,

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title, or to comply with the conditions of any such status, is deportable.

Pursuant to 8 C. F. R. § 241.1(a)(3):

At the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of his or her authorized period of admission or extension of stay, or upon abandonment of his or her authorised nonimmigrant status.

See also 8 U.S.C. § 1184 (explaining the manner in which the Attorney General's discretion pertains to various nonimmigrant alien categories).

[43] 10 U.S.C. § 3253.

[44] *See* 8 C.F.R. § 214.1(e) (nonimmigrant aliens may not engage in productive employment without authorization); 8 C.F.R. § 214.2(f) (prohibiting F-1 visa holders from obtaining gainful employment, not including work-study and internship programs); 8 C.F.R. § 214.2(h) (permitting temporary employment of H-1B nonimmigrants); 8 C.F.R. § 214.2(*l*) (prohibiting L-2 spouses from obtaining employment without prior authorization). The penalty for unauthorized employment is a determination of "failure to maintain status." 8 C.F.R. § 214.1(e). The gainful employment ban may also be excepted in other cases of financial hardship. *Steel*, at 3-40-42.

[45] Pursuant to the U.S. Tax Guide for Aliens, as compared to resident aliens and citizens, "Nonresident aliens are tax only on their income from sources within the United States and on certain income connected with the conduct of a trade or business in the United States." IRS PUB. 519, 2003 WL 23305933 (I.R.S.).

[46] *Mathews*, 426 U.S. at 83, 96 S.Ct. at 1893. *See also* 26 U.S.C. § 3306(c) (8) (amended by the AMERICAN JOBS CREATION ACT OF 2004, PL 108-357, October 22, 2004, 118 STAT 1418 and the RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION ACT

the Supreme Court has yet expressly to bestow equal protection status on nonimmigrant aliens.[47]

Based on the aggregate factual and legal distinctions between resident aliens and nonimmigrant aliens, we conclude that although aliens are a suspect class in general, they are not homogeneous and precedent does not support the proposition that nonimmigrant aliens are a suspect class entitled to have state legislative classifications concerning them subjected to strict scrutiny. We declined to extend the Supreme Court's decisions concerning resident aliens to different alien categories when the Court itself has shied away from such expansion. We thus turn to the plaintiffs' alternative Equal Protection arguments.

Contrary to plaintiffs' contention, there is no precedential basis for the proposition that nonimmigrant aliens are a quasi-suspect class or that state laws affecting them are subject to intermediate scrutiny. The decision in *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264 (1996), which reinforced caselaw that treats *gender* as a "quasi-suspect classification," furnishes no authority for the application of intermediate Equal Protection analysis to alienage classifications. *Virginia*, 518 U.S. at 532-33, 116 S. Ct. at 2275. Again, we decline to move where the Supreme Court has not gone.

By process of elimination, rational basis review must be the appropriate standard for evaluating state law classifications affecting nonimmigrant aliens. Here, caselaw has distinguished between traditional rational basis review and

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FOR FISCAL YEAR 2005, PL 108-375, October 28, 2004, 118 STAT 1811).

[47] *Toll*, 458 U.S. at 9-10, 102 S. Ct. at 2982 (refusing to reach equal protection argument). *Plyler* is not to the contrary, as it involved the special class of alien children, who were not responsible for their immigration status, and the provision of education.

heightened rational basis review. But, the latter standard appears solely in *Plyler*, which, as noted, is a far different case from the case at bar. There, after declaring that undocumented aliens are not a suspect class[48] and that education is not a fundamental right, *see id.*, 457 U.S. at 223, 102 S. Ct. at 2398, the Court found the children of illegal aliens, having no culpability for or control over their condition, are worthy of "special judicial solicitude" in the form of heightened rational basis review. *Id.* Thus, the Court elevated the rational basis tests and inquired whether the Texas law "furthered some *substantial* goal of the state." *Id.* at 224, 102 S. Ct. at 2398 (emphasis added). Had the Court not modified rational basis review in *Plyler*, the Texas law would have survived. As articulated by the Court, traditional rational basis analysis provides that:

> The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that *roughly approximate the nature of the problem perceived*, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears ***some fair*** relationship to a legitimate public purpose.

Id. 457 U.S. at 216, 102 S. Ct. at 2394 (emphasis added). Under the traditional test, Texas's legitimate interests — conservation of budget resources and deterrence of illegal immi-

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[48] Under the plaintiffs' rationale – that lack of political capacity alone should render an alien group worthy of heightened judicial solicitude and strict scrutiny review – undocumented aliens would be the most insular and deserving of *Carolene Products* minority status. Yet, the Court specifically denied them suspect status.

gration — probably would have been sufficient to justify the state's decision to deny state benefits to illegal entrants and their children. But in this unique instance, the Court was moved by the consequences and unfairness of enforcing such a regulation against children. *Id.* at 220, 102 S. Ct. at 2396.[49]

These plaintiffs who would be Louisiana lawyers find no support in *Plyler*. As nonimmigrant aliens, they entered this country voluntarily and with an understanding of their limited, temporary status. They face no hurdle as debilitating as denial of primary and secondary education. That, under Section 3(B), they are denied the ability to engage in a specific type of legal work — that requiring a license — is simply not analogous to the plight of illegal alien children. Nothing in *Plyler* compels the determination that nonimmigrant alien law students and temporary workers are similarly situated to the children of illegal aliens, and, thus, entitled to similar heightened rational basis review.

Under traditional rational basis analysis, a state law classification that "neither burdens a fundamental right nor targets a suspect class" will be upheld "so long as it bears a rational relation to *some* legitimate end." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S. Ct. 2293, 2297 (1997) (emphasis added). The key principle is the deference to legislative policy decisions embodied in courts' reluctance to judge the wisdom, fairness, logic or desirability of those choices. Viewed through this deferential lens, Section 3(B)'s classification bears a rational relationship to legitimate state interests — Louisiana' substantial interest in regulating the practice of those it admits to its bar. Section 3(B) aims to assure clients that attorneys licensed by the Louisiana Bar will provide continuity and accountability in legal representation. The Bar's

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[49] The Court's invalidation of the Texas law further rested upon a determination that the state's action was not in accord with congressional policy. *Id.* at 224-25, 102 S. Ct. at 2399.

ability to monitor, regulate, and, when necessary, discipline and sanction members of the Bar requires that it be able to locate lawyers under its jurisdiction. The State's determination that the easily terminable status of nonimmigrant aliens would impair these interests and their enforcement capacity is not irrational.

The plaintiffs argue that in focusing on the alleged transience of nonimmigrant aliens, Section 3(B) irrationally fails to deal with other causes of lawyer nonfeasance. While it is true that any attorney, regardless of citizenship status, could fall ill, become unavailable to clients, or leave the jurisdiction (and many actually do leave), such concerns are distinct from the special quandary arising from the federally prescribed transience of nonimmigrant aliens. The problem perceived by the defendants is that if a nonimmigrant practitioner leaves the country (voluntarily or by compulsion) to the detriment of Louisiana clients, such an attorney would be utterly beyond the reach of the Louisiana Bar. Contrary to the plaintiffs' contentions, the international transience of nonimmigrant alien practitioners is not analogous to that of a citizen or immigrant alien practitioner who leaves Louisiana. State reciprocity and interstate bar agreements would allow the Louisiana Bar to pursue an attorney who relocates domestically, but there is no doctrine of international reciprocity enabling the Louisiana Bar to reach a malfeasant or nonfeasant nonimmigrant attorney who has fled the United States. Even if the Bar tracked down such an attorney in a foreign country, because nonimmigrants (in contrast to citizens and immigrant aliens) may not establish domicile in the United States and will usually have limited assets here, Louisiana courts would have questionable ability to exercise jurisdiction over such a person. The state would be impotent to remedy unethical or incompetent conduct, and a Louisiana client's ability to seek redress would be frustrated. Section 3(B) is underinclusive with respect to all possible foreseeable types of attorney abandonment, but it is not irrationally un-

derinclusive with respect to this particularly troublesome situation.[50]

In these ways, Section 3(B), which limits Bar admission to persons able to live and work permanently in the United States, is rationally related to the state's interest in assuring continuity and accountability in legal representation. Section 3(B) does not make the mistake, remedied in *Griffiths*, of denigrating aliens in general. Instead, Section 3(B) recognizes that the inherent terms and conditions of nonimmigrant status all but assure a lack of continuity and impairment of the Bar's ability to carry out its regulatory and police functions. As such, Section 3(B) is a proper exercise of Louisiana's police powers in pursuit of these interests.

Plaintiffs also complain that Section 3(B) is irrationally overinclusive because it assumes that nonimmigrant alien practitioners will be transient, when in fact they are just as likely, having gone to the trouble to be admitted to the Louisiana Bar, to extend their stays in this country. The plaintiffs' argument is plausible, but no more so than the state's contrary hypothesis. Moreover, unlike American citizens who seek admission to the bar in a state where they do not reside, the nature of nonimmigrant transience is substantially different — nonimmigrant aliens cannot unilaterally change their transient or noncitizen status.

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[50] In concluding that the Bar Committee in *Griffiths* failed to establish the necessity of excluding "all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards[,]" the Court noted that "once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts . . . . the range of postadmission sanctions extends from judgments for contempt to criminal prosecutions and disbarment." 413 U.S. at 727, 93 S. Ct. at 2857-58. The Louisiana Bar's concern that the temporary status of student and H-1B temporary worker visa holders might frustrate its ability to carry out these functions is legitimate.

The plaintiffs also generally criticize Section 3(B) as overbroad (*e.g.*, because H-1B nonimmigrants must be sponsored by an employer, who in a case of malfeasance, may be ethically responsible for the attorney's misdeeds) and imprecise in achieving its desired ends. Even if it is flawed, the provision cannot be legitimately characterized as arbitrary or irrational. A court's inquiry is not for legislative precision, acuity, or acumen. *See Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 1627 (1996) (stating that "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous"). Section 3(B) may be undesirable in an increasingly globalized commercial climate, but our perception of the wisdom of the measure fails to render it constitutionally infirm under traditional rational basis review. Section 3(B) need only be rationally related to *some* legitimate end. *Romer*, 517 U.S. at 632, 116 S. Ct. at 1627. Section 3(B) is, at the least, "roughly approximate" to the concerns identified by Louisiana, given "limitations on the practical ability of the state to remedy every ill." *Plyler*, 457 U.S. at 216, 102 S. Ct. at 2394.

Because Section 3(B) serves a legitimate end, and there is no basis for applying a heightened level of scrutiny, it survives rational basis review.

2. Due Process

The *LeClerc* plaintiffs assert procedural due process challenges to Section 3(B). As aliens, they are "'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210, 102 S. Ct. at 2391 (citations omitted).[51] Procedural due process entitles a person to a hearing before being deprived of an interest pro-

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[51] The Privileges and Immunities Clause protects only citizens. *Compare Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607 (1987).

tected by the Fourteenth Amendment. *Bd. of Regents v. Roth*, 408 U.S. 564, 570, 92 S. Ct. 2701, 2705 (1972). As relevant here, "the existence of . . . eligibility rules" gives a party seeking admission to practice his chosen profession "an interest and claim to practice . . . to which procedural due process requirements appl[y]." *Roth*, 408 U.S. at 577, n.15, 92 S. Ct. at 2709, n.15 (internal citation omitted). However, procedural due process rights do not vest in a party who has failed to seek a hearing before filing suit. *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 123, 46 S. Ct. 215, 218 (1926); *See also Myrick v. City of Dallas*, 810 F.2d 1382, 1388 (5th Cir. 1987) (holding that a complainant "cannot skip an available state remedy and then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy"). Although Louisiana's Bar admission rules gave the plaintiffs an interest to which procedural due process rights attached, the plaintiffs cannot state a claim for a procedural due process violation because they opted not to appeal under Section 9.

3. Supremacy Clause and Preemption

The plaintiffs maintain that Section 3(B) is preempted by the comprehensive statutory scheme embodied in the Immigration and Nationality Act ("INA") and conflicts with some of its specific provisions.[52] Despite the federal government's primacy over the regulation of immigration, not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted . . . ." *DeCanas*, 424 U.S. at 355, 96 S. Ct. at 936. The Constitution, by committing regulation of immigration to the federal govern-

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[52] The *LeClerc* plaintiffs further contend that NAFTA and GATS, which they argue are intended to liberalize United States licensing and certification requirements, evince congressional intent to preempt restrictive state licensing schemes. The *LeClerc* plaintiffs' arguments concerning NAFTA and GATS are, respectively, inapposite and unpreserved.

ment, did not deprive the states of all power to legislate regarding aliens.[53] *Id.* Nevertheless, ostensibly harmonious state regulation may run afoul of the Supremacy Clause if it, in effect, interferes with the goals of federal policy. *Id.* Yet, even in this context, "[f]ederal regulation . . . should not be deemed preemptive in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Id.* at 356, 96 S. Ct. at 937 (internal citation omitted).

Section 3(B) is unquestionably a permissible exercise of Louisiana's broad police powers to regulate employment within its jurisdiction for the protection of its residents. *See id.* at 356, 96 S. Ct. at 937 (explaining that a state has "broad . . . policy powers" to regulate employment within its borders. The Louisiana Supreme Court was rationally entitled to conclude that the temporary status of nonimmigrant aliens could impede the Bar's regulatory and disciplinary efforts.[54] Conditions that frustrate the administration of Louisiana's licensing scheme are "certainly within the mainstream of such police power regulation." *Id.* at 356-57, 96 S. Ct. at 937.

Further, as a state regulation dealing with the employment of nonimmigrant aliens, Section 3(B) is not facially preempted by the INA. The Supreme Court has acknowl-

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[53] See *Plyler*, 457 U.S. at 229, n.19, 102 S. Ct. at 2396, n.19 ("If the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction") (citing *DeCanas*, 424 U.S. 351, 96 S. Ct. 933).

[54] Contrary to the plaintiffs' contentions, the status of bar admission rules in other states is neither controlling nor persuasive. A situation discerned as problematic by the state need not be viewed as pervasive or universal in order to justify the state's attempt to address it.

edged that "there is no indication that Congress intended to preclude state law in the area of [alien] employment regulation." *Id.* at 358, 362, 96 S. Ct. at 937-38, 940. Thus, the field of alien employment tolerates harmonious state regulation.

The fact that Section 3(B) denies Bar admission to some aliens and not to others conflicts neither with the INA nor with the Supreme Court's disposition in *Toll*. In *Toll*, the Court invalidated a University of Maryland policy denying in-state tuition status to G-4 nonimmigrant aliens — who are permitted by congressional directive to establish domicile in the United States — as inconsistent with federal policy that prevented these student aliens from establishing state domicile. *Toll*, 458 U.S. at 11, 102 S. Ct. at 2983. *Toll* held that, "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." However, the Court added a caveat:

> To be sure, when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute.

Toll 458 U.S. at 12-13, 102 S. Ct. at 2983 (quoting, in part, *DeCanas*, 424 U.S. at 358, n.6, 96 S. Ct. at 938, n.6). The substantive holding in *Toll* is distinguishable from the instant case for two reasons. First, Section 3(B) raises the situation contemplated, but not addressed, in *Toll* — the validity of state laws affecting *transient* nonimmigrant aliens. Second, there is no incongruity between what Congress permits of student and temporary worker nonimmigrants and what Section 3(B) prevents.

First, as with the alien class in general, the sub-class of nonimmigrant aliens is itself heterogeneous, and the distinctions among them are relevant for preemption purposes. *Toll* specifically distinguished between G-4 nonimmigrant aliens

— upon whom Congress expressly declined to impose domicile restrictions — and the F-1 student and H-1B temporary worker nonimmigrant aliens at issue in this case — upon whom Congress has clearly imposed domicile restrictions.[55] Section 3(B) affects only the latter group.

Second, Section 3(B) does not succumb to the *Toll* infirmity of proscribing by state law what Congress expressly permits by federal statute. Section 3(B) does not prevent the legal matriculation of nonimmigrant alien students admitted to the United States on F-1 or J-1 visas. Section 3(B) is, in fact, consistent with provisions that prohibit student visa holders from obtaining gainful employment, require them to obtain specific authorization for certain types of matriculation-related employment, *e.g.*, internships and work-study programs, requires their departure at the expiration of their

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[55] As the Court stated in *Toll*:

> [T]he nonimmigrant classification is by no means homogenous .... For example, Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States .... [A] nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning ... and who seeks to enter the United States temporarily and solely for ... study ...." § 101(a)(15)(F). *See also* ... § 101(a)(15)(H) (temporary worker having residence in foreign country "which he has no intention of abandoning") .... *But Congress did not restrict every nonimmigrant class.* In particular, no restrictions on a nonimmigrant's intent were placed on [G-4] aliens ... [T]his was deliberate ... confirmed by the regulations ... which provide that G-4 aliens are admitted for an indefinite period ....

Elkins v. Moreno, 435 U.S. 647, 665, 98 S. Ct. 1338, 1349 (emphasis added). See also *Toll*, 458 U.S. at 7, n.8, 102 S. Ct. at 2980, n. 8 (citing *Elkins*, 435 at 665, 98 S. Ct. at 1349 and 8 U.S.C. §§ 1101(a)(15)(B), (F), (H)).

status, and prohibits them from establishing domicile in the United States.

Nor does Section 3(B), contrary to plaintiffs' contentions, prevent them from complying with H-1B nonimmigrant visa requirements. H-1B status requires the nonimmigrant applicant to qualify for a temporary worker visa by presenting documentation of: a state professional license; a bachelor's, or higher, degree in the profession; an equivalent foreign degree; *or* equivalent foreign experience. 8 C.F.R. § 214.2(h). H-1B's four compliance measures are disjunctive; its professional licensing option is permissive, not mandatory. While Section 3(B) permits one of these alternatives, it does not prevent an H-1B visa holder who satisfies at least one of the other compliance methods from obtaining employment within the broad field encompassed by the practice of law. Moreover, Section 3(B) is consistent with an H-1B visa provision that contemplates non-licensed employment.[36] As demonstrated, Section 3(B) is in accord, rather than conflict, with federal regulation of alien employment.

The plaintiffs finally argue that the INA impliedly preempts Section 3(B) because it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *DeCanas*, 424 U.S. at 363, 96 S. Ct. at 940. We disagree. As the Court made clear in *DeCanas*, the intersection of state and federal law does not necessarily re-

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[36] 8 C.F.R. § 214.2(h) provides that:

> Duties without licensure. In certain occupations which generally require licensure, a statute may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

quire or effect preemption. Upholding a California law criminalizing the employment of illegal aliens, *DeCanas* held that the overlap of state and federal law did not equate to "withdrawal from the States of power to regulate where the activity regulated was a mere peripheral concern" to the federal law. *Id.* at 361, 96 S. Ct. at 939. Similarly, while Section 3(B) prohibits Bar admission of nonimmigrant aliens even though the INA permits H-1B visa holders to seek professional licensing, the provision is "peripheral" to intersecting federal law which does not itself mandate domestic professional licensing.

Section 3(B) is a state Bar rule designed to address local problems arising from the transitory status of nonimmigrant aliens who, by the terms and conditions of their federal status, possess fewer ties to the United States than any other group (besides illegal aliens). Section 3(B) attempts to protect Louisiana residents seeking legal representation and affects a class of persons whom Congress has expressly prohibited from living or working permanently in the United States. *See id.* at 363, 96 S. Ct. at 940 (explaining that although federal law predominates in the field of immigration, there is minimal federal interest in state laws crafted to address local problems and affecting local entities in a manner consistent with federal declarations). Rather than standing as an obstacle to federal law, Section 3(B) is consistent with the federal policy embodied in the INA.

CONCLUSION

For the reasons stated herein, the judgment in *LeClerc v. Webb*, 270 F. Supp. 2d 779 (E.D. La. 2003) is AFFIRMED. The judgment in *Wallace, et al v. Calogero, et al.*, 286 F. Supp. 2d 748 (E.D. La. 2003) is REVERSED.

CARL E. STEWART, Circuit Judge, concurring in part and dissenting in part:

I concur in the panel's majority decision affirming the district courts' rulings that : (1) Section 3(B) is not preempted by federal immigration or trade policy; (2) the defendants' jurisdiction arguments should be denied; (3) the plaintiffs' due process arguments should be dismissed, (4) plaintiff Affleck lacked standing to assert a claim under the NAFTA, and (5) the *LeClerc* plaintiffs' motion to reconsider should be denied. For the following reasons, I respectfully dissent from the majority's conclusion that the plaintiffs' Equal Protection claim should be dismissed.

First, I disagree with the majority's conclusion that strict scrutiny review should not apply to the issue before us. The Supreme Court in *Graham v. Richardson* held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." 403 U.S. 365, 372 (1971) (internal citation omitted); *see also Applications of Griffiths*, 413 U.S. 717, 721 (1973). It should be noted that not all limitations on aliens are suspect. *See Foley v. Connelie*, 435 U.S. 291, 294 (1978). Although the general rule is that classifications of aliens are suspect and strict scrutiny should apply, the Court has also held that less than strict scrutiny is warranted where a state law discriminates based on alienage classification regarding matters related to the democratic process. *Id.* ("a democratic society can be ruled by its own people"). Also, because Congress has plenary power to regulate immigration, federal statutes and presidential orders that discriminate against aliens are also reviewed with something less than strict scrutiny. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("the relationship between the U.S. and our alien visitors has been committed to the political branches of the federal government. Since decisions in these matters may implicate our

relations with foreign powers . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive branches than to the Judiciary."). In all other circumstances, the Supreme Court has applied strict scrutiny to classifications based on alienage. Alienage is defined as the state or condition of being an alien. BLACK'S LAW DICTIONARY 79 (8th ed. 1999). An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The majority is wary about "expanding" strict scrutiny review to nonimmigrant aliens as a distinctive suspect class in the absence of a black letter holding by the U.S. Supreme Court to that effect. I disagree with the majority's reservations because the Supreme Court's statement that "alienage is a suspect class" by definition includes nonimmigrant aliens as part of that class.

The majority emphasizes that, as opposed to the Rule at issue here, "the rule at issue in *Griffiths* effected a 'total exclusion [of all] aliens from the practice of law' in Connecticut." Proposed Op. at 415. However, the Supreme Court has stated that "[t]he fact that the [challenged] statute is not an absolute bar [against all aliens] does not mean that it does not discriminate against the class." *Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977). It is only important that the Rule is directed at aliens and only aliens are harmed by it. *Id.* Section 3(B) only allows citizens and resident aliens to apply for admission to the Louisiana state bar. *In re Bourke*, 819 So.2d 1020, 1021 (La. 2002). Because the Louisiana Supreme Court has defined resident aliens as "aliens who have been granted permanent resident status in the United States," *id.*, the Rule discriminates against all nonimmigrant aliens. The Rule does discriminate against the class because it is directed at aliens and only aliens are harmed by it.

In discussing the alien suspect class, the Supreme Court has referred to resident aliens, aliens and non-citizens interchangeably. The majority uses the term resident aliens in referring to the suspect class first created in *Graham v.*

Richardson. In order to properly understand the semantics in this case, it is necessary to explore the definitions used in the Immigration and Nationality Act (INA), 8 U.S.C. § 1101, *et seq*. All aliens legally admitted in the U.S. fall into one of two categories: immigrant (persons who want to become permanent residents) and non-immigrant (persons granted stay for a limited period of time). DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURES § 5-1 – 6-1 (4th ed. 1998). These two broad categories are each further divided into specific types of visas. *Id.* In INA, there is no definition of resident alien, only a definition of residence as referring "only to the place of general abode without regard to intention."[1] See 8 U.S.C. § 1101(a)(33). Thus, residence and immigration status should be understood as two separate distinctions; one does not necessarily have to do with the other. As the district court noted in *Wallace v. Calogero*, "the term 'resident alien' is broader than the Act's immigration categories and includes both immigrant and nonimmigrant aliens lawfully residing in the United States." 286 F. Supp. 2d 748, 762 (E.D. La. 2003). In other words, a nonimmigrant alien who lives in the United States is but one class of resident alien. I read the term "resident alien," as it is used I the Supreme Court's jurisprudence, as simply indicating that the

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[1] Resident alien is essentially a tax distinction. *See* 26 U.S.C. § 7701(b). There are primarily two ways to determine whether one is a resident alien for tax purposes. The first is the green card test, if you have a green card, and therefore are a permanent resident, you are a resident under tax law. *Id.* at § 7701(b)(1)(A)(i). The other is the substantial presence test. Under the substantial presence test you will be considered a U.S. resident if you were physically present in the U.S. for at least 31 calendar days during the course of the year and 183 days during the 3 year period that includes the current year and two previous years immediately before it. *Id.* at § 7701(b)(3). Considering H-1B visa holders, for example, can stay in the country for up to 6 years, it is possible for an alien to be both a non-immigrant and pay taxes as a resident alien.

alien resides in the United States. This point is further made clear by Justice Blackmun's majority opinion in *Kleindienst v.Mandel*, 408 U.S. 753 (1972). Justice Blackmun, the author of the majority opinion in *Graham*, used the term "nonresident alien" to refer to plaintiff Ernst Mandel, a Belgian citizen who resided in Brussels. 408 U.S. at 762.

The Court has not distinguished between immigrant aliens or nonimmigrants when discussing the alienage suspect class even though the Court has had before it cases which involved extensive review of the Immigration and Naturalization Act and its various classifications for admitted aliens; the Court was not ignorant of the terminology associated with the INA's alien classifications nor presumably of the distinctions between these classifications. *See e.g., Kleindienst*, 408 U.S. at 753, 757 n.4 (holding that a Belgian citizen living in Brussels, "as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise"); *see also Saxbe v. Bustos*, 419 U.S. 65 (1974) (holding that daily and seasonal alien commuters qualify as immigrant aliens rather than as nonimmigrant aliens). Despite the Court's familiarity with the distinction between immigrant and nonimmigrant aliens, the Court has still spoken of a general "alien" suspect class.

The defendants and the majority rely heavily on the fact that the Court's cases that employ strict scrutiny analysis all involved plaintiffs who were permanent resident aliens.[2] However, I am not persuaded that based on this fact alone, the Court's strict scrutiny analysis should be restricted to laws that discriminate against permanent resident aliens. Again, the Supreme Court has not explicitly emphasized the alien plaintiffs' permanent resident status in discussing the

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[2] It should be noted that in some of the Supreme Court's opinions, the exact nature of the plaintiff's immigration status is unclear or not discussed. *See e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

alien suspect class. As the majority opinion observes, nonimmigrant aliens have come before the Court asserting Equal Protection claims. Twice the Court found it unnecessary to reach the Equal Protection issue, *see Toll v. Moreno*, 458 U.S. 1 (1982), and *De Canas v. Bica*, 424 U.S. 351 (1976), and once the Court applied rational basis review, see *Plyler v. Doe*, 457 U.S. 202 (1982). Although the Court applied rational basis review to the aliens in *Plyler*, as the majority notes, *Plyler* "is a far different case from the case at bar." Proposed Op. at 420. *Plyler* involved illegal aliens. In refusing to grant suspect classification to illegal aliens, the Court focused on their undocumented and unlawful status. *Plyler*, 457 U.S. at 219 n.19. The nonimmigrant aliens here, by contrast, are lawfully admitted aliens. The Court's opinions have applied strict scrutiny review when the plaintiffs at issue are lawfully admitted aliens who reside in the United States, like the plaintiffs here. *See e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *Graham*, 403 U.S. at 371.

The majority also relies heavily on the Supreme Court's statement in *Griffiths* that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722. Nonimmigrant aliens do pay taxes, support the economy and contribute in other ways to our society. *See* n.1, *supra*. Nonetheless, I am not persuaded that an alien's ability to serve in the Armed Forces or pay taxes is the primary rationale for affording suspect class designation to aliens; after all aliens were afforded suspect class designation before *Griffiths*. *See Graham*, 403 U.S. 365. Instead, the basis for aliens' class designation seems to be premised on aliens' inability to vote, and thus their impotence in the political process, and the long history of invidious discrimination against them. *See Plyler*, 457 U.S. at 218 n.14 (citing *Graham*, 403

U.S. at 372); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 618-19 (1997). *See generally Takahashi*, 334 U.S. 410.

In order to distance nonimmigrant aliens from the class of "aliens" that the Supreme Court has recognized as inherently suspect, the majority emphasizes the temporary and "transient" status of nonimmigrant aliens. However, the majority is unable to avoid the Supreme Court's ruling in *Toll v. Moreno*, which recognized that nonimmigrant aliens who hold a G-4 visa are aliens with permanent status similar to citizens and immigrant aliens. 458 U.S. 1 (1983); *see also Elkins v. Moreno*, 435 U.S. 647, 663-64 (1978). The majority vigorously asserts that G-4 nonimmigrant aliens are distinct from the nonimmigrant aliens here because the aliens here are "transient nonimmigrant aliens," a new alienage classification crafted by the majority's opinion only. However, the constitutional challenge here is not an as applied challenge to Section 3(B). The plaintiffs assert that the rule discriminates against all nonimmigrant aliens. Therefore, if one nonimmigrant alien group does not fit within the opinion's analysis — that nonimmigrant aliens are not a suspect class because they are not "permanent" residents — then the majority's argument as a whole must fail.

The majority states that "nonimmigrant aliens — who ordinarily stipulated before entry to this country that they have no intention of abandoning their citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here — need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone." Proposed Op. at 417. But, not all nonimmigrant aliens are required to keep a permanent residence abroad and are not allowed to intend to stay in the United States. Besides, G-4 nonimmigrant aliens, the Immigration Act of 1990 states that H-1 and L category visa holders (as some of the plaintiffs are here) do not have to pledge an intention to only stay in the United States temporarily, and can seek permanent

residence in the United States. 22 C.F.R. § 41.11; 8 C.F.R. §§ 214.2(h)(16), (1) (16); 68 No. 21 Interpreter Releases 681-84 (June 3, 1991). The BIA and the State Department also recognize the doctrine of dual intent, which allows nonimmigrant aliens who are required to keep a permanent residence in their foreign country to both express a short term intent to remain in the United States temporarily (so as to not contravene the requirements of the visa under which they entered) and a long term intent to remain in the United States permanently (so that they may apply for adjustment of status). *Matter of Hosseinpour*, 15 I&N Dec. 191, 192 (BIA 1975); 70 No. 42 Interpreter Releases 1444, 1456-58 (No. 1, 1993).

I read the Supreme Court's jurisprudence to provide that nonimmigrant aliens, as persons who are not citizens nor nationals of this country, are part of the alien suspect class and therefore, laws that discriminate against them are inherently suspect and should be subjected to strict scrutiny review. Because of the Court's opinions, the presumption should be that nonimmigrant aliens are part of the alien suspect class and the defendants should have the burden of proving the opposite. I am not persuaded by the arguments put forth by the defendants that the Supreme Court did not intend to include nonimmigrant aliens as part of the alienage suspect classification.

Nevertheless, even assuming *arguendo* that rational basis is the appropriate analysis to be used in this case, I disagree with the majority's holding that the Louisiana rule survives rational basis review. To pass rational basis review, the defendants must show that nonimmigrant aliens pose some special threat to the State's legitimate interests, in a way that other permitted bar applicants, citizens or immigrant aliens, do not. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) ("it is true that the mentally retarded as a group are indeed different . . . [b]ut this difference is largely irrelevant unless the [group home] and those who would occupy it would threaten legitimate interests of the

city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below").

The majority opinion's discussion of the equal protection claim is most problematic at this point because it is in essence trying to "push a square peg into a round hole." The defendants assert that nonimmigrant aliens pose a special threat to the integrity of the Louisiana bar because they could be unexpectedly deported or they could leave and go back to their home country, leaving litigants in the lurch. The defendants assert that unlike citizens and immigrant aliens, nonimmigrant aliens are more susceptible to being "international transients." The Louisiana Supreme Court would be unable to reach malfeasant attorneys because the Louisiana bar does not have reciprocity with other nations and because nonimmigrant aliens are not able to establish domicile and, therefore, the state courts could not assert jurisdiction.

However true that may be, these concerns apply equally to both citizens and immigrant aliens. Citizens have a constitutional right to travel. *Califano v. Gautier Torres*, 435 U.S. 1 (1978). Although the Louisiana state bar may have reciprocity with other states, citizens could leave the country and establish residency abroad, and as the majority states, Louisiana does not have reciprocity with other nations. Likewise, immigrant aliens may travel abroad and not return, leaving clients behind. Moreover, both nonimmigrant aliens and immigrant aliens are subject to deportation; only citizens may not be deported. The majority asserts that nonimmigrant aliens pose a special threat to Louisiana clients because nonimmigrant aliens may not establish domicile or have assets in Louisiana and, therefore, the courts may be precluded from asserting jurisdiction over nonimmigrant attorneys should the need to reach them arise. But the Louisiana bar has no requirement that bar applicants, or bar members, be Louisiana

residents or spend any time in Louisiana or in any way have a connection with the state. Therefore, Louisiana courts may also be unable to assert jurisdiction over members of the Louisiana bar who are citizens or immigrant aliens. Moreover, it may be possible for nonimmigrant aliens to be domiciled in Louisiana — as the Supreme Court found that the nonimmigrant alien plaintiffs were in *Toll*. *See* 458 U.S. at 17. As the district court in *Wallace* averred:

> The Rule does not restrict membership to the bar to citizens and immigrant aliens who plan to reside permanently in Louisiana. Nonimmigrant aliens as a class are not necessarily more transient than other groups. Citizens and immigrant aliens may be admitted to the bar even if they have no intention of residing in Louisiana. Louisiana attorneys relocate to other states and maintain bar membership in states where they do not reside. Due to advances in technology, attorneys can provide services and representation to clients from virtually anywhere. Louisiana attorneys retire, die, and leave the practice for a myriad of reasons. If the Louisiana Supreme Court were concerned with transience, the Rule would be calculated to address that problem directly. However, the Rule only excludes a fraction of persons who may have temporary residence in the state. The fact that the Plaintiffs must leave on a date certain does not change the analysis. On the contrary, it might be an advantage. Plaintiffs will be able to plan in advance for their departure and make the necessary arrangements to protect the interests of their clients.

Wallace, 286 F. Supp. 2d at 763.

In my view, the Louisiana rule does not pass constitutional muster under even the exceedingly permissive rational basis standard of review. The Rule at issue is purported to be

a prophylactic remedy to insulate potential clients from lawyers who are forced to leave the country unexpectedly, or who leave the country voluntarily, without an available means for the state courts to assert jurisdiction to reach the malfeasant attorneys. However, if the purpose of the Rule is to protect court dockets from disruption and protect the state's citizens from lawyers who may leave suddenly, the Rule is not the least restrictive way to do it nor, as the district court in *Wallace* noted, is the Rule in fact calculated to achieve this purpose.

For the foregoing reasons, I respectfully dissent from the majority's dismissal of the plaintiffs' Equal Protection claim and the reversal of the district court's judgment in *Wallace v. Calogero*.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Karen Leclerc, et al.

v.

Daniel A. Webb, et al.

Docket No. Civ. A. 03-664

July 2, 2003

ORDER AND REASONS

ZAINEY, District Judge.

Before the Court are Defendants' Motion to Dismiss filed by Justices Jeffrey P. Victory, Jeannette Theriot Knoll, Chet D. Traylor, Catherine D. "Kitty" Kimball, John L. Weimer, Bernette Joshua Johnson, in their official capacities as Justices as of the Supreme Court of Louisiana and Daniel A. Webb and Harry J. Phillips, Jr., in their official capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions, Plaintiffs' Appeal of the Order of the Magistrate Judge Granting a Protective Order and Staying All Discovery and Plaintiffs' Motion for Summary Judgment filed by Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck.

Plaintiffs are non-immigrant aliens[1] residing in the United States pursuant to temporary visas. Plaintiffs have brought this suit challenging Louisiana Supreme Court Rule

[1] The terms non-resident alien and non-immigrant alien are used interchangeably throughout this opinion. Likewise, the terms resident alien and immigrant alien are also used interchangeably.

XVII, Section 3(B) which requires that every applicant to the Louisiana bar be a citizen or resident alien of the United States. They allege that Rule XVII, as currently interpreted by the Louisiana Supreme Court, is unconstitutional and/or preempted by federal law. Plaintiffs seek declaratory and injunctive relief as well as an award of costs and attorney's fees. Defendants have moved to dismiss all claims arguing *inter alia* that the suit is barred by the Eleventh Amendment as well as the doctrine of judicial and legislative immunity. Defendants also argue that Plaintiffs fail to state a claim for relief under federal law.

I. Factual Background

Plaintiffs currently reside in the United States under temporary visas which provide a date certain when they must leave the United States. Leclerc, Jarry and Boulord are French citizens admitted to the United States pursuant to J-1 visas. Affleck is a Canadian citizen admitted to the United States pursuant to an L-2 visa. All plaintiffs are graduates of foreign law schools. Plaintiffs desire to submit applications to sit for the July 2003 bar examination and believe themselves to be qualified but for their status as non-resident aliens.[2]

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[2] Supreme Court Rule XVII Section 3(B) requires that every applicant for admission to the Louisiana Bar "[b]e a citizen of the United States or a *resident alien* thereof." La. S.Ct. R. XVII, § 3(B) (emphasis added). The Louisiana Supreme Court had previously interpreted the term "resident alien" to include foreign nationals lawfully living within the United States. *See, e.g., In re Appert*, 444 So.2d 1208 (La. 1984), *overruled by In re Bourke*, 819 So.2d 1020 (La. 2002). However, in 2002, the court held that the term "resident alien" applies to aliens who have been granted permanent resident status in the United States as opposed to those who are merely residing in the country on a temporary basis. *Bourke*, 819 So.2d at 1022. The court expressly overruled any prior decisions to the contrary. *Id.*

Affleck applied for an equivalency determination pursuant to Rule XVII, Section 6.[3] On November 15, 2002, the Bar Admissions administrator informed Affleck that an equivalency determination would not be forthcoming because Affleck was neither a U.S. Citizen nor resident alien. Rec. Doc. 8, Exhibit 9. Affleck did not petition the Louisiana Supreme Court for a review of that denial pursuant to Section 9 of Rule XVII.[4] When this suit was filed, Leclerc, Jarry, and Boulord had not yet applied for equivalency determinations.[5] Although untimely under the Louisiana rules, Leclerc, Jarry and Boulord submitted equivalency applications after Defen-

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[3] Louisiana's bar admission rule provides:

> An applicant who has graded from a law school that is not located in the United States or its territories must submit an application to the Committee for an equivalency determination. Such application shall be in addition to all other applications required by this rule.

La. S.Ct. R. XVII, § 6(A).

[4] The pertinent text of Section 9 of Rule XVII is located at note 7 *infra*.

Jarry did attempt to petition the Louisiana Supreme Court for permission to take the bar exam. However, he did so without completing any of the requisite steps to apply for admission through the Committee. The Court therefore rejected his petition as premature. *In re Royer*, 836 So.2d 627 (La. 2003).

[5] Leclerc, Jarry and Boulord claim that they would have timely submitted equivalency applications but for the experiences of Nathalie Royer, Veronique, Mart, and Celine Mogues. Royer, Mary and Mogues received favorable equivalency determinations but their applications to sit for the bar were denied due to their residency status. Royer, Marty, and Mogues sought writs in the United States Supreme Court but their application was untimely. After this suit was filed and Defendants raised the case or controversy arguments, Leclerc, Jarry, and Boulord then filed applications for equivalency.

dants argued (in their motion to dismiss) that Plaintiffs lacked standing to bring this suit.[6]

On March 6, 2003, Plaintiffs Leclerc, Jarry, and Boulord filed their original complaint seeking declaratory relief and injunctive relief against Defendants as well as costs and attorney's fees. Plaintiffs named as defendants six of the seven Louisiana Supreme Court Justices — Jeffrey P. Victory, Jeanette Theriot Knoll, Chet D. Traylor, Catherine D. "Kitty" Kimball, John L. Weimer, and Bernette Joshua Johnson ("the Justices"), Daniel A. Webb, Chairman of the Louisiana Committee on Bar Admissions, and Harry J. Phillips, Jr., Vice-Chairman of the Louisiana Committee on Bar Admissions ("the Bar Admissions Officials") (collectively "Defendants"). All Defendants were sued in their official capacities only.

The Court held a status conference on March 20, 2003, and set deadlines for briefing on cross motions for summary judgment: Rec. Doc. 7. Plaintiff Affleck joined this suit via amended complaint on March 27, 2003. Defendants moved to stay all discovery pending a determination on their immunity defenses and on May 1, 2003, the magistrate judge granted a stay. Rec. Doc. 17. Plaintiffs' appeal of that order is currently before the Court and is inextricably intertwined with the arguments raised in Defendants' motion to dismiss.

Pursuant to the Court's scheduling order, Plaintiffs filed their fully-briefed motion in support of declaratory relief[7] and

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[6] Louisiana's bar admission rules require that equivalency applications for those applicants wishing to take the July 2003 bar exam were due no later than December 1, 2002. La. S.Ct. R. XVII, § 6(A).

[7] After Defendants questioned whether the Federal Courts Improvement Act of 1996, 110 Stat. 3847, 2853 (1966) (amending 42 U.S.C. § 1983), would permit injunctive relief against the state's judicial officers, Plaintiffs moved to amend their complaint to drop the request for injunctive relief. Rec. Doc. 27. The Court denied

Defendants filed their fully-briefed motion to dismiss. Both motions were set for hearing on May 21, 2003. On May 21, 2003, the Court held a status conference at Plaintiffs' request and at Plaintiffs' urging the motions were continued for hearing on June 4, 2003. The Court ordered supplemental briefing on Plaintiffs' immigration status, and on June 25, 2003, the Court heard oral argument.

In their motion for summary judgment Plaintiffs pray for a judgment:

> 1. Declaring the unconstitutionally of Section 3(B) of Rule XVII of the Rules of the Louisiana Supreme Court as interpreted by that Court to deny bar admission to "non-resident aliens";
>
> 2. Declaring that Section 3(B) of Rule XVII of the Rules of the Louisiana Supreme Court as interpreted by that Court is preempted by the plenary power of the Federal Government to set immigration policy;
>
> 3. Declaring that the Louisiana Supreme Court and the Louisiana Committee on Bar Admissions may not constitutionally deny plaintiffs the opportunity to sit for the Louisiana state bar examination solely on account of the fact that they are not citizens or resident aliens and to permit them to submit an application package, including that for equivalency determination if one has not already been submitted, so as to permit them to sit for the Louisiana state bar examination in July 2003, provided that they meet all other requirements of Rule XVII, as reasonably interpreted;
>
> 4. Awarding Plaintiffs reasonable costs and attorney's fees under 42 U.S.C. § 1998.

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the motion to amend for reasons unrelated to the request for injunctive relief.

Defendants assert that Plaintiffs fail to present a justiciable case or controversy because their claims are not ripe for adjudication and because Plaintiff lack standing. Defendants further argue that Plaintiffs' claims are barred by the Eleventh Amendment and the doctrines of judicial immunity and/or legislative immunity. Finally, Defendants argue that Plaintiffs' complaint fails to state a claim upon which relief can be granted. Alternatively, Defendants urge the Court to abstain from this matter. The Court addresses each argument in turn.

II. Defendants Motion to Dismiss

A. Legal Standards

A litigant may object to a court's lack of jurisdiction through a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Jurisdictional defects include immunity of the defendants in an action and the court's consequent lack of subject matter jurisdiction. *Bank One Texas v. United States*, 157 F.3d 397, 403 & n. 12 (5th Cir. 1998). Under Rule 12(b)(6), a court must dismiss a complaint that fails to state a claim upon which relief can be granted. When considering a Rule 12(b)(6) motion to dismiss, the court views all material allegations in plaintiff's complaint as true. *See In re Mastercard, Int'l, Inc.*, 313 F.3d 257, 261 (5th Cir. 2000). Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss. *Id.*

B. Case or Controversy

Defendants assert that Plaintiffs rest their claim on factual assumptions and conjecture that do not present a "case" or "controversy" under Article III of the United States Constitution. Thus, Defendants assert that Plaintiffs' claims are not ripe for adjudication and that Plaintiffs lack standing to pursue their asserted claims.

Defendants point out that Leclerc, Jarry and Boulord have taken none of the required steps in order to sit for the Louisiana bar exam. Thus, Leclerc, Jarry and Boulord have not been subject to any adverse action by Defendants on any basis including their alienage. Defendants point out that Leclerc, Jarry and Boulord must obtain equivalency determinations for their foreign law school educations, and that an adverse determination on equivalency would moot any issue as to their residency status. Because Leclerc, Jarry, and Boulord have been subject to no adverse action, Defendants argue that they also lack standing to bring this suit because they seek redress for an injury that has not and may never occur.

Defendants concede that Affleck submitted a timely application for an equivalency determination and that her application was not considered due to her status as a non-resident alien. However, Defendants contend that Affleck has also a ripeness/standing problem because she did not avail herself of the review procedures provided in Supreme Court Rule XVII, Section 9.[8] Defendants contend that at the conclusion

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[8] Rule XVII, Section 9, Denial of Eligibility; Appeals, provides:

> Upon notice to the applicant by the Committee that an applicant has failed to fulfill one or more of the requirements of Sections 3 or 5, or upon notice to the applicant from the Committee that the equivalency panel has found that applicant's legal education is not equivalent to that received by a graduate of a law school approved by the American Bar Association as required by Section 6, and that the Committee concurs in such finding, the applicant may appeal by petition directly to the Court.
>
> (B) Procedure in Supreme Court. The Court may, in its discretion, without taking further evidence, affirm or reverse the Committee's recommendation, remand to the Committee for further action as the Court instructs, or appoint a Commission to take evidence.

La. S.Ct. R. XVII, § 9.

of that appeal process, which all Plaintiffs would be required to complete, the *Rook-Feldman* doctrine would then have deprived this Court of jurisdiction to consider Plaintiffs' claims.[9]

Although she did not avail herself of the review procedures provided in the Supreme Court rules, Affleck asserts that federal law does not require exhaustion of state remedies prior to bringing a claim alleging violations of federal law. Moreover, she asserts that any appeal would have been futile anyway. Given then that the bar committee has cited Affleck's alienage as the basis for refusing to consider her equivalency application, Affleck asserts that she has a justiciable claim.

Leclerc, Jarry, and Boulord argue that Affleck's situation demonstrates the futility of submitting an equivalency application, and therefore, excuses their failure to seek equiva-

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[9] The *Rooker-Feldman* doctrine directs that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. *Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir. 1994) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462. Constitutional questions arising in state proceedings are to be resolved by the state courts. *Id.* Any alleged constitutional error in the state court judgment is to be reviewed and corrected by the appropriate state appellate court. *Id.* Thereafter, recourse at the federal level is limited solely to an application for a writ of certiorari to the United States Supreme Court. *Id.* The casting of a complaint in the form of a civil rights action cannot circumvent this rule, as absent a specific delegation "federal district court[s], as court[s] of original jurisdiction, lack[ ] appellate jurisdiction to review, modify, or nullify final order[s] of state court[s]." *Id.* (quoting *Kimball v. Florida Bar*, 632 F.2d 1283, 1284 (5th Cir. 1980)).

lency determinations.[10] Leclerc, Jarry, Boulord argue that concrete injury is surely imminent.[11]

In reply, Defendants clarify that they are not arguing that any type of administrative exhaustion applies to Plaintiffs' constitutional claims.[12] Rather, Defendants argue that Plaintiffs must receive a definitive adverse action before they may complain of a constitutional violation. Until Plaintiffs pursue their applications through the review and appeal procedures provided for in the Louisiana Supreme Court rules, no plaintiff has received a definitive adverse action for purposes of standing and ripeness.

Article III of the United States Constitution limits federal courts to the decision of "cases" and "controversies." *Shields v. Norton*, 289 F.3d 832, 834-35 (5th Cir. 2002). Ripeness and standing are two "justiciability doctrines" developed by federal courts to give meaning to the case or controversy requirement. *United Transportation Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). Thus, ripeness and standing are both constitutional prerequisites to the exercise of jurisdiction.

Ripeness

A matter is ripe only where an "actual controversy" exists. *Shields*, 289 F.3d at 835 (citing 28 U.S.C. § 2201(a)). Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that

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[10] As discussed at note 3 *supra*, Jarry submitted a procedurally improper petition to the Louisiana Supreme Court.

[11] Plaintiffs' counsel informed the Court at the April 17, 2003, status conference that Leclerc, Jarry and Boulord had submitted equivalency applications after they filed suit.

[12] Indeed, it is well-established that administrative exhaustion does not apply to civil rights claims unless specifically mandated by Congress. *Porter v. Nussle*, 534 U.S. 516, 523; *Turner v. Houma Municipal Fire*, 2002 WL 1467876 (E.D. La. Jul. 8, 2002).

are appropriate for judicial review. *United Transportation*, 205 F.3d at 857 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99. A case is generally ripe if any remaining questions are purely legal ones. *Id.* (*quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987).). Conversely, a case is not ripe if further factual development is required. *Id.* When challenging a statute or rule, ripeness may require that the rule be evaluated in light of a particular situation rather than a hypothetical one. *See Texas v. United States*, 523 U.S. 296, 301.

The Court is not persuaded that Plaintiffs' claims are not ripe for adjudication. Both parties agree that no further factual development is necessary in this litigation. The only issues now before the Court are strictly legal ones. Clearly, an actual controversy exists between the parties.

Further, this case does not involve the speculative and hypothetical type of injury at issue in those cases where plaintiff's challenge to a statute has been rejected as premature. For instance Defendants cite *National Park Hospitality Association v. Department of the Interior*, 538 U.S. 803, in support of their ripeness argument. In *National Park*, plaintiffs made a facial challenge to a federal law whose scope was unclear. Plaintiffs argued that the uncertainty as to the statute's application was causing them injury in that they could not adequately prepare bids for certain government contracts. The Court rejected that contention and concluded that judicial resolution of the statute's application should await a concrete dispute about a particular contract. 123 S.Ct. at 2032-33.

In contrast, the Louisiana Supreme Court has already applied Rule XVII in at least one particular instance in this litigation, *i.e.*, Affleck's application. Her application for equivalency was denied solely due to her residency status. Based on the Louisiana Supreme Court's decision in *In re*

Bourke, 819 So.2d 1020 (La. 2002), and in *In re Schnyder*, 824 So.2d 1135 (La. 2002), as well as the experiences of Royot, Marty, and Moguen, there is no reason to think that the Supreme Court would have granted Affleck relief had she pursued the appeal process. Likewise, there is no reason to believe that Leclerc, Jarry and Boulord would have been any more successful than Affleck, Bourke and Schnyder. Accordingly, Plaintiffs' claims are ripe for adjudication.

Standing

To satisfy the standing requirement, the plaintiff must have suffered an injury in fact. *Southern Christian Leadership Conf. v. Supreme Court of the State of Louisiana*, 252 F.3d 781, 787 (5th Cir. 2001). An "injury in fact" is an invasion of a legally protected interest which is both (a) concrete and particularized, and (b) actual or imminent and not conjectural or hypothetical.[13] *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555. Plaintiff cannot establish standing by relying on an undifferentiated interest in the proper application of the law. *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998).

To establish standing to challenge an allegedly unconstitutional policy, as a general matter "a plaintiff must submit to the challenged policy." *Ellison v. Connor*, 153 F.3d 247, 254-55, (5th Cir. 1998) (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997)). In other words, a plaintiff "may not seek redress for injuries done to others." *Id.* (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163). However, in the Fifth Circuit, this threshold requirement for standing may be excused where the plaintiff makes a "substantial showing that application for the benefit . . . would have been futile." *Id.* (citing *Jackson-Bey*, 115 F.3d at 1096).

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[13] The injury must also be traceable to the defendant, and the injury must be redressible. *Southern Christian Leadership Conf. v. Supreme Court of the State of Louisiana*, 252 F.3d at 787. Those aspects of standing are not at issue in this case.

In *Ellison*, the Fifth Circuit applied this "futility exception" to plaintiff landowners who sought to challenge the constitutionality of a Corps of Engineers permitting decision. Defendants argued that plaintiffs lacked standing because they had not actually applied for, and been refused, a permit. However, the Corps had previously advised plaintiffs via letter that it would not allow construction on plaintiffs' land. The Fifth Circuit reversed the district court's finding of no standing. 153 F.3d at 254-55. The court concluded that it would be futile to require the plaintiffs to ask the Corps for a permit when the Corps had already made a determination that no permit would issue. *Id.* at 255.

Based on the foregoing, the Court has no doubt that Affleck has standing to challenge Rule XVII. The Bar Committee informed Affleck that her equivalency application would not be considered due to her residency status. The therefore suffered a concrete injury as a result of Rule XVII. Based upon the prior decisions of the Louisiana Supreme Court denying the petitions of other non-immigrant aliens the Court concludes that any petition to the Louisiana Supreme Court would have been futile.

Leclerc, Jarry, and Boulord present a far more difficult question because they took no steps in furtherance of submitting an application to sit for the bar exam prior to filing this lawsuit. Although they submitted equivalency applications *after* they filed this lawsuit, those applications appear to be untimely and therefore may be rejected by Defendants on grounds wholly unrelated to their residency status. However, without a doubt Defendants will eventually reject Leclerc, Jarry, and Boulord's applications due to their residency status given the Supreme Court's unequivocal position on the issue. The fact that Leclerc, Jarry, and Boulord will suffer injury due to Rule XVII is not conjectural or hypothetical. It just has yet to happen. Because their injury is certain to occur

and imminent, the Court concludes that they too have standing to challenge Rule XVII.[14]

In sum, Defendants' motion to dismiss based on Plaintiffs' failure to establish a case or controversy is DENIED.

C. Eleventh Amendment Immunity

Defendants argue that the Eleventh Amendment bars Plaintiffs' claims. Because all defendants are state officials sued in their official capacities, the state is the real party in interest. Therefore, Defendants argue, the Eleventh Amendment bars suit regardless of the relief sought.

Plaintiffs do not dispute that the Eleventh Amendment applies to the Justices as well as to the Bar Admission Officials. Plaintiffs assert, however, that sovereign immunity does not bar the prospective declaratory relief Plaintiffs seek. Plaintiffs argue that any assertion that the Eleventh Amendment bars suit regardless of the type of relief sought is contrary to established United States Supreme Court jurisprudence.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir. 1994) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495

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[14] The Court's resolution of the standing issue naturally has no relevance whatsoever as to whether Defendants will ultimately grant Plaintiffs' equivalency applications on the merits.

U.S. 299, 304, 110 S.Ct. 1868, 1871, 109 L.Ed.2d 264 (1990)). Although by its terms the Amendment applies only to suits against a state by citizens of another state, the Supreme Court interprets the Amendment as barring suits in federal court by citizens against their own states as well. *See Cox v. City of Dallas*, 256 F.3d 281, 307 (5th Cir. 2001) (citing *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 962, 148 L.Ed.2d 866 (2001)).

The Eleventh Amendment may not be evaded by suing state officers in their official capacities because such an indirect pleading device remains in essence a claim against the state. *Id.* (citing *Stem v. Ahearn*, 908 F.2d 1, 3 (5th Cir. 1990)). Eleventh Amendment relief is available to both the Louisiana Supreme Court and the Louisiana State Bar Association. *Southern Christian Leadership v. Supreme Court of State of Louisiana*, 61 F.Supp.2d 499, 505 (E.D. La. 1999) (citing *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986)).

However, where state officials are sued in their official capacities, the doctrine of *Ex parte Young* may operate as an exception to the Eleventh Amendment. *Cox*, 256 F.3d at 307 (citing *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). Under *Ex parte Young*, the Eleventh Amendment does not bar a suit against a state official alleged to be acting in violation of federal law. *Id.* The *Ex parte Young* doctrine is grounded on the concept that the state cannot authorize its officials to violate the Constitution and laws of the United States. *Id.* (citing *Ex parte Young*, 209 U.S. at 160, 28 S.Ct. 441, 52 L.Ed. 714). *Ex parte Young* only permits an award of declaratory or prospective injunctive relief, *i.e.*, to enjoin the future enforcement of an unconstitutional rule, regulation, or law. *See id.; Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 400 (7th Cir. 1996). Retrospective relief in the form of a money judgment in compensation for past wrongs — no matter how small — is barred. *Brennan v. Stewart*, 834 F.2d 1248, 1252 (5th Cir. 1988). The *Ex parte*

Young exception does not apply to state law claims. *See Pennhurst v. Halderman*, 465 U.S. 89, 105, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984) (noting that *Ex parte Young* is inapplicable where violations of state law are at issue).

In this case Plaintiffs' *federal* claims fall squarely within the *Ex parte Young* exception to Eleventh Amendment immunity. Plaintiffs have sued all defendants in their official capacities and seek only declaratory and prospective injunctive relief. Plaintiffs are not seeking monetary compensation for past wrongs. Therefore, Defendants are not entitled to dismissal of Plaintiffs' federal claims based upon Eleventh Amendment immunity. However, to the extent Plaintiffs are attempting to assert any type of state law claim, those state law claims are dismissed for lack of subject matter jurisdiction.[15]

In sum, Defendants' motion to dismiss based on Eleventh Amendment immunity is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED insofar as Plaintiffs are attempting to assert state law claims. The motion is DENIED as to Plaintiffs' federal claims.

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[15] Without citation of authority or explanation, Defendants concede that Plaintiffs Fourteenth Amendment claims are not barred by the Eleventh Amendment. Defendants' Motion to Dismiss at 13 n.6. For the reasons explained above, Defendants are correct. However, Fourteenth Amendment claims generally are subject to the Eleventh Amendment except where Congress expressly abrogates the state's immunity when legislating pursuant to its enforcement powers under the Fourteenth Amendment. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72, 120 S.Ct. 631, 640, 145 L.Ed.2d 522 (2000); *Santiago v. New York Dep't of Correct. Servs.*, 945 F.2d 25, 28 (2d Cir. 1991).

D. Absolute Immunity

1. Judicial Immunity

Defendants argue that judges are absolutely immune from suits based upon actions taken in their official *judicial* capacities. Further, Defendants point out that Congress enlarged judicial immunity via the Federal Courts Improvement Act of 1996 ("the FCIA") which specifically amended 42 U.S.C. § 1983.

Plaintiffs dispute whether the actions complained of were taken in Defendants' *judicial* capacities. Plaintiffs point out that their claims arise out of the way Defendants are enforcing an allegedly unconstitutional rule and therefore Defendants' actions have been taken in their enforcement capacities. Plaintiffs assert that the FCIA was not intended to erase the distinction previously made between actions taken in a judicial officer's *judicial* capacity versus those taken in *enforcement* and *administrative* capacities. Plaintiffs also assert that judicial immunity does not apply to the *declaratory* relief Plaintiffs seek.

Plaintiffs distinguish their case from those upholding judicial immunity by pointing out that their case is one questioning the constitutionality of a bar admissions rule generally as opposed to an aggrieved individual. Plaintiffs remind the Court that their challenge to Rule XVII is a facial one so that they are not challenging the adjudication of an individual application, *i.e.*, action taken in the officer's judicial capacity. As such, Plaintiffs argue that their claims are not barred by judicial immunity.

Three United States Supreme Court cases form an appropriate starting point for consideration of Defendants' judicial immunity defense. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736, 100 S.Ct. 1967, 1977, 64 L.Ed.2d 641 (1980), the Supreme Court held that judicial immunity did not bar injunctive relief against the Virginia

Supreme Court and its chief justice. Plaintiffs brought a facial challenge to an allegedly unconstitutional bar rule and sought to enjoin defendants from prospectively enforcing it against attorneys. In upholding the injunction, the Court distinguished between the various capacities in which the state's supreme court was authorized to act under state law. Thus, in conjunction with administering bar matters, the state's highest court engages in adjudicative duties (determining moral fitness of attorney applicants), legislative or rule-making duties (promulgating bar admission rules and procedures), and enforcement duties (applying the bar rules against attorneys or bar applicants), but judicial immunity would not *per se* apply to the latter two functions. In *Consumers Union*, the Court held that plaintiffs were entitled to declaratory and injunctive relief without regard to the defendants' status as judicial officers because the lawsuit arose out of their role as "enforcers" of the bar rules. Thus, like any state official who enforces laws, injunctive and declaratory relief were available notwithstanding that defendants were judicial officers. *Id.*

Four years later, in *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1981, 80 L.Ed.2d 565 (1984), the Supreme Court held that judicial immunity did not preclude declaratory and injunctive relief against a judicial officer acting in his or her *judicial* capacity. In *Pulliam*, plaintiff had challenged the constitutionality of a state judge's practice of incarcerating persons awaiting trial for nonincarcerable offenses — acts clearly taken in defendant's judicial capacity. Thus, in the wake of *Consumers Union* and *Pulliam*, judicial immunity did not apply to acts taken by judicial officers in their *enforcement* capacities and was not a bar to declaratory and injunctive relief for acts taken in the judge's *judicial* capacity.

Finally, in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), the Court again recognized the importance of properly categorizing a judicial officer's acts

for purposes of determining whether judicial immunity applies. In that case the Court found judicial immunity inapplicable where a state judge had been sued for sexual discrimination in employment-related matters. *Id.* at 229, 108 S.Ct. at 545. The Court noted that there is no immunity for "acts that simply happen to have been done by judges" when those acts are not judicial acts. *Id.* at 227, 108 S.Ct. at 544. Rather, the "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* Although the Supreme Court had never articulated a precise and general definition of the class of acts entitled to immunity, the Court recognized the "intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.* at 227, 108 S.Ct. at 544.

Consumers Union, *Pulliam*, and *Forrester* demonstrate that the question of judicial immunity in any given situation can only be answered with reference to the relief sought and the *capacity* in which the judge had acted. It is also clear that the Supreme Court in crafting judicial immunity over the years did not consider every act taken by a judge to be in his judicial capacity merely by virtue of the officer's status as a judge.

If *Consumer's Union*, *Pulliam*, and *Forrester* remain good law then Defendants' judicial immunity argument is without merit.[16] However, in 1996 Congress enacted the Federal Courts Improvement Act of 1996 which amended 42 U.S.C. § 1983 to provide that "in any action brought against a judicial officer for an act or omission taken in such officer's *judicial* capacity, injunctive relief shall not be granted

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[16] *Consumer's Union* is not inapplicable merely because that case dealt with provisions of the Virginia bar's code of ethics. *Consumer's Union* is applicable because it dealt with a facial challenge to the code of ethics rather than the application of the code of ethics to an individual attorney in disciplinary proceedings.

unless a declaratory decree was violated or declaratory relief was unavailable." Pub. L. No. 104-317, 110 Stat. 3847 (Oct. 19, 1996) (emphasis added). The Senate report indicates that the amendment "restores the doctrine of judicial immunity to the status it occupied prior to [*Pulliam*]" because *Pulliam* had departed from "400 years of common law tradition and weakened judicial immunity protections." S. Rep. 104-366, at *36-*37, 1996 U.S.C.C.A.N. 4202, 4216-17.

Defendants can make no colorable argument that the FCIA did anything to alter the landscape with respect to declaratory relief. Declaratory relief against judges acting in their judicial capacities was well-established before the FCIA. The FCIA amendments continue to contemplate declaratory relief by making express reference to it as a first step before injunctive relief is permissible. Moreover, the FCIA does not purport to eliminate the clear distinctions among the various capacities in which judicial officers act. The Supreme Court's jurisprudence had long been unequivocal in that the Court did not consider every act taken by a judicial officer to be a "judicial act" subject to judicial immunity. Therefore, Congress's decision to preclude injunctive relief when the judge acts specifically in his "judicial capacity" can only mean that injunctive relief remains available when the judicial officer acts in other capacities. This Court cannot make law. Had Congress intended for the amendment to apply regardless of which capacity the judge was acting, Congress would have said so. Likewise, had Congress intended to erase the long accepted capacity distinctions recognized by the High Court it would have used appropriate language.[17] Instead, Congress specifically refers to acts taken in the ***judicial*** capacity. The Court is persuaded

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[17] Interestingly, Defendants' own invocation of legislative immunity belies any assertion that they believe that the FCIA erased the recognized distinctions between the various capacities in which judges act.

that the FCIA does not bar injunctive relief where a judicial officer acts in other capacities such as enforcement capacity.

Defendants have argued strenuously that the FCIA protects them from injunctive relief because the acts of which Plaintiffs complain were performed in Defendants' *judicial* capacities. The Court is not so persuaded given the unique role that the Louisiana Supreme Court occupies under the state constitution and given that Plaintiffs are making a facial challenge to Supreme Court Rule XVII.

The Louisiana Constitution gives Defendants the exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, the discipline, suspension and disbarment of lawyers, and the client-attorney relationship. *Succession of Wallace*, 574 So.2d 348, 350 (La. 1991) (citing *LSBA v. Edwins*, 540 So.2d 294 (La. 1989); *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102, 109, 115 (La. 1979); *LSBA v. Connolly*, 201 La. 342, 9 So.2d 582 (1942); *Ex Parte Steckler*, 179 La. 410, 154 So. 41 (1934); *Meunier v. Bernich*, 170 So. 567 (La.App. 1936)). Consequently, the Louisiana Legislature cannot enact laws defining or regulating the practice of law in any aspect without Defendants' consent. *Id.* (citing La. Const. 1974, Art. II). Nor is any officer of the executive branch charged with enforcing bar rules. Thus, in conjunction with attorney and bar matters, the Louisiana Supreme Court acts in the role of all three branches of government. It acts as a legislative branch when promulgating rules, as a judicial branch when considering whether a particular applicant should be granted admission, and as an executive branch when it enforces or applies the very rules it makes. Clearly, had Plaintiffs been mounting a facial challenge to an unconstitutional statute passed by the legislature, the proper party defendant would be the executive branch state officer charged with enforcing that statute. In this case, due to the unique role of the Louisiana Supreme Court, Defendants are

those state officers. In sum, for the facial challenge Plaintiffs bring today, Defendants are the proper party defendants because they are charged with enforcing the allegedly unconstitutional rule. Thus, for a suit mounting a facial challenge Defendants are by clear implication being sued in their enforcement capacities.

Moreover, this conclusion is not at odds with the well-established principle that admission to a jurisdiction's bar is "peculiarly a judicial function." *McFarland v. Folsom*, 854 F.Supp. 862, 874 (M.D. Ala. 1994). Because Plaintiffs are mounting a facial challenge to Rule XVII and are not suing Defendants for any individual culpability in conjunction with Rule XVII, the "judicial function" aspects of judicial immunity are not at issue here. Thus, the Court concludes that Defendants are not entitled to judicial immunity for Plaintiffs' claims.[18]

In sum, Defendants' motion to dismiss based on judicial immunity is DENIED.

2. Legislative Immunity

Defendants assert that they are entitled to absolute legislative immunity from any suit related to bar admissions rulemaking. When the Justices and Bar Admissions Officials promulgate and implement bar admission rules they occupy the position of legislators.

In addition to Plaintiffs' arguments already recited regarding immunity, Plaintiffs assert that immunity does not extend to protect rules that are unconstitutional. Thus, re-

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[18] *Pulliam* also held that Plaintiff could recover costs and attorney's fees in conjunction with obtaining injunctive relief against a judicial officer for acts taken in her judicial capacity. The FCIA amended 42 U.S.C. Section 1988(b) to reverse that aspect of *Pulliam*. Because the attorney's fee issue is wholly premature at this time, the Court expresses no opinion as to whether Plaintiffs could ultimately recover costs and attorney's fees in this action.

gardless of the capacity in which Defendants are acting, a person's constitutional rights cannot be breached to prevent him/her from practicing law.

When exercising its sovereign rule-making authority, a state supreme court occupies the same position as that of the state legislature. *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)). Like legislators, the members of the state's highest court are entitled to absolute legislative immunity in conjunction with promulgating bar admission rules. *Consumers Union*, 446 U.S. at 730-34, 100 S.Ct. at 1974-75. Thus, legislative immunity would foreclose any suit based upon the issuance of, or failure to amend, a challenged bar admission rule. *Id.* at 734, 100 S.Ct. at 1976. The same immunity applies to members of a state bar association whose role is "completely defined by the court." *Lewis*, 792 F.2d at 497 (quoting *Bates*, 433 U.S. at 361, 97 S.Ct. at 2697).

Plaintiffs are making a facial challenge to the constitutionality of Rule XVII. They seek to enjoin its enforcement. None of their claims are directed at Defendants' role in having promulgated Rule XVII. Accordingly, legislative immunity is inapplicable. Defendants' motion to dismiss based on legislative immunity is DENIED.

E. Abstention

Defendants argue that the Court should exercise its discretion to abstain from this matter pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). Defendants point out that this matter involves questions of state law that are uniquely within the knowledge and expertise of the Louisiana Supreme Court. Therefore, the Louisiana Supreme Court, and not the federal judiciary, should oversee and administer Louisiana's bar admission rules.

In opposition, Plaintiffs argue that *Burford* abstention is inappropriate because no difficult questions of state law are involved in this case. Rather, Plaintiffs challenge Section 3(B) of Rule XVII on *inter alia* federal constitutional grounds. Thus, there is no justification for this Court to abdicate its jurisdiction.

While federal courts have a strict duty to exercise jurisdiction that is conferred upon them by Congress, the duty is not absolute. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996). Keeping in mind that abstention is the exception and not the rule, federal courts may decline to exercise their jurisdiction in circumstances where denying a federal forum would clearly serve important countervailing interests such as considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration. *Id.* In exercising their discretion, federal court must "fit within the narrow and specific limits prescribed by the particular abstention doctrine involved." *Webb v. B.C. Rogers Poultry Inc.*, 174 F.3d 697, 701 (5th Cir. 1999) (quoting *Clark v. Fitzgibbons*, 105 F.3d 1049, 1051 (5th Cir. 1997)). The *Burford* abstention doctrine allows federal courts to dismiss a case only if it presents

> [D]ifficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar or if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Quackenbush, 517 U.S. at 707, 116 S.Ct. at 1716 (quoting *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244-45).

Without doubt this lawsuit involves questions of substantial state concern. There is no question that bar admission is distinctly a matter in which Louisiana has substantial interests. Unarguably, the Louisiana Supreme Court has unique

knowledge and familiarity with the considerations at stake when licensing lawyers.

Notwithstanding, Plaintiffs' claims do not involve the "difficult questions of state law" required for *Burford* abstention. Plaintiffs' claims are based solely on federal law. The meaning of Supreme Court Rule XVII is not at issue in this suit. The only issue is whether that rule is in conflict with various federal laws. Thus, the threshold requirement for *Burford* abstention is not present in this case.

Furthermore, Defendants' abstention argument is less persuasive given that many of Plaintiffs' federal arguments have already been presented to and rejected by the Louisiana Supreme Court. *See In re Bourke,* 819 So.2d 1020 (2002). At this time, there are no pending state court proceedings in which this Court need fear of interfering.

For the foregoing reasons the Court declines to exercise its discretion to abstain from this matter.

III. Plaintiffs' Motion For Summary Judgment

Plaintiffs move for summary judgment on their claims for declaratory relief. They assert that all facts are contained in the pleadings and that none of the relevant facts are in dispute. Plaintiffs point out that because this action results from the unconstitutionality of Louisiana Supreme Court Rule XVII, Section 3(B), and the Rule's blanket application to non-immigrant aliens, it is clear that no facts exist which could be contentious or that might affect the result of the action. Plaintiffs assert that the record indicates that the only genuine issue is one of constitutionality, and therefore, the case is ripe for summary adjudication.[19]

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[19] Defendants did not file a cross motion for summary judgment but filed a motion to dismiss instead. Defendants' arguments in opposition are taken from their motion to dismiss which Defen-

A. Legal Standards

In determining whether a party is entitled to summary judgment, the court views the evidence in the light most favorable to the non-moving party. *Littlefield v. Forney Indep. School Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (citing *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998); *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604, 608 (5th Cir. 1998)). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The moving party bears the burden, as an initial matter, of showing the district court that there is an absence of evidence to support the nonmoving party's case. *Id.* (citing *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2548, 106 S.Ct. 2548). If the moving party fails to meet this initial burden, the motion must be denied regardless of the nonmoving party's response. *Id.*

B. Constitutional Claims

Notwithstanding the plenary power of the state's highest court to regulate the practice of law, a state cannot exclude a person from the practice of law for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). Regardless of whether a state's grant of permission to practice law is a "right" or "privilege," a person cannot be prevented from practicing law except for valid reasons. *Id.* n.5 (citing *Ex parte Garland*, 4 Wall. 333, 379, 18 L.Ed. 366 (1866)).

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dants have also designated as their opposition to Plaintiffs' motion for summary judgment.

1. Due Process Claims

Plaintiffs assert that they were entitled to a hearing, the presentation of evidence to prove their allegations, and to the disclosure of whatever information and recommendations were presented to the Louisiana Supreme Court by the Louisiana State Bar Association Committee on Admissions. Plaintiffs assert that they were denied their due process rights when the Louisiana Supreme Court overruled its prior *jurisprudence constante* without giving Plaintiffs an opportunity to be heard.

Defendants argue, that Plaintiffs do not state a claim for a procedural due process violation nor a substantive due process violation. Defendants point out that none of the Plaintiffs availed themselves of the state review procedures and therefore can claim no due process violation. Defendants argue that a substantive due process claim only protects "fundamental rights" and that there exists no fundamental or constitutional right of a non-lawyer to practice law.

The Court has reviewed the authorities cited by Plaintiffs in support of their contention that they were denied due process of law and concludes that Plaintiffs fail to state a claim for a due process violation. While *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), does require that a denial of an application to practice law must comport with principles of procedural due process, the case does nothing to support the contention that Leclerc, Jarry, Boulord, and Affleck have been denied procedural due process. *Willner* requires the state to inform an applicant of the reasons his application is being denied and to permit a hearing thereafter. *Id.* at 105, 83 S.Ct. at 1181. Affleck was given the specific reasons for Defendants' refusal to consider her equivalency application. The Supreme Court rules expressly permitted her to petition the Louisiana Supreme Court and to request a hearing. *Willner* requires no more. Affleck cannot claim a procedural due process viola-

tion as a result of her own failure to pursue the state procedural r[illegible]edies available to her. Given that Leclerc, Jarry, and Bo[illegible]d made no attempt, prior to filing this law suit, to submit an application to the Committee, they clearly have no claim for a procedural due process violation.

Likewise, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), does not persuade the Court that Plaintiffs have stated a claim for a substantive due process violation. In *Schware*, the United States Supreme Court held that the state had impermissibly applied its moral fitness standards to exclude plaintiff from practicing law. *Id.* at 247, 77 S.Ct. at 760. The Court held that the state had deprived plaintiff of due process of law because the record was wholly insufficient to support the state's finding of bad moral character. *Id.*

In the instant case, Plaintiffs are mounting a facial challenge to Supreme Court Rule XVII. *Schware* does not provide Plaintiffs a cause of action for a substantive due process violation in conjunction with a facial challenge. Instead *Schware* would allow an applicant aggrieved of the state's bar admission process to mount a due process challenge based upon his *individual* situation. If Plaintiffs had hoped to make such a claim then their appropriate course of action would have been to pursue the state procedures for appeal and then to seek certiorari in the United States Supreme Court as Schware had done. Even if Plaintiffs had done so, the *Rooker-Feldman* doctrine would have precluded such a substantive due process claim brought as an original action in this Court.

In sum, Plaintiffs' complaint fails to state a claim for deprivation of due process. Accordingly, Defendants' motion to

dismiss is GRANTED with respect to Plaintiffs' due process claims.[20]

2. Equal Protection Claim

Plaintiffs argue that Rule XVII, Section 3(B) violates the equal protection clause. Plaintiffs assert that alienage is a suspect classification which triggers strict scrutiny for purposes of an equal protection challenge. Plaintiffs assert that Defendants have given no justification for Rule XVII much less one that could withstand strict scrutiny. Plaintiffs further contend that even under a lower level of scrutiny, Rule XVII cannot withstand attack. Plaintiffs assert that an individual's residency status is wholly unrelated to his or her character and therefore is not a permissible criterion for bar admission purposes. Plaintiffs assert that *In re Griffiths*, 413 U.S. 717,

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[20] Plaintiffs' various memoranda suggest that they were denied due process because the Louisiana Supreme Court reversed its prior stance on the residency issue without giving Plaintiffs an adequate explanation and prior notice of the court's intention. This contention is absurd.

Further, Plaintiffs complaint that Defendants have never expressed publicly the reason for their change in policy regarding non-resident aliens. Rec. Doc. 12 at 9. It is clear from Plaintiffs' original complaint in this Court as well as the *Royot, et al.* petition for certiorari filed with the United States Supreme Court that Plaintiffs believe that the Louisiana Supreme Court's sudden reversal on the alien issue was prompted by the participation of foreign lawyers in Louisiana death penalty cases. Even though the Court finds this allegation highly speculative and questionable, as explained in *Southern Christian Leadership Conference*, unpopular motivations (even if substantiated) do not transform a challenged rule "into an unconstitutional state action." 252 F.3d at 794-95.

Finally, the Court fails to comprehend the relevance of other state bar admission rules to any of the legal issues in this case.

93 S.Ct. 2851, 37 L.Ed.2d 910, (1973), clearly supports their claims.

Citing *Southern Christian Leadership Conference v. Supreme Court of Louisiana*, 252 F.3d 781, 786 (5th Cir. 2001), Defendants contend that Plaintiffs have failed to state a claim for a constitutional violation because there is no fundamental right for a non-lawyer to practice law. Simply said, Plaintiffs have no constitutional right to sit for the Louisiana bar exam and this circuit consistently recognizes the plenary power of the Louisiana Supreme Court to regulate the practice of law.

Defendants argue that *In re Griffiths* is legally and factually dissimilar from this case and therefore does not support Plaintiffs' claims. Defendants assert that Louisiana's decision not to offer bar admission to those persons with truly temporary status, and who are therefore transient, falls within the valid and legitimate exercise of the State's public safety and police power.

While there may be no constitutional right for admission to a state's bar, admission policies and procedures cannot run afoul of the Equal Protection Clause. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). The Equal Protection Clause of the Fourteenth Amendment directs that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)). However, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as if they were the same." *Id.* (alteration in original) (quoting *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940)). Aliens are "persons" guaranteed equal protection of the laws. *Id.* at 210, 102 S.Ct. at 2391.

Well-established principles of constitutional law hold that classifications upon a suspect class or classifications that af-

fect fundamental rights are subject to strict scrutiny review. *Hatten v. Rains*, 854 F.2d 687, 690 (5th Cir. 1988) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973)). Such laws are presumptively invalid unless the state can demonstrate that the law is the least restrictive means to achieve a compelling state interest. *See id.*; *In re Griffiths*, 413 U.S. at 721, 93 S.Ct. at 2855. Rarely, if ever, will laws survive challenge at this level of scrutiny. *Bernal v. Fainter*, 467 U.S. 216, 220 n.6., 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984) ("As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact.")

However, classifications which operate upon a quasi-suspect class are accorded intermediate scrutiny, and must bear a significant relationship to an important state end. *Id.* (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981)). All other classifications need only bear a rational relationship or basis to a legitimate legislative end. *Id.* (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).

Hence, the threshold issue in any equal protection analysis is the level of scrutiny to be applied. The applicable level of scrutiny is of paramount importance to the parties because the level of scrutiny applied often serves as the bellwether of the statute's validity. Naturally then, Plaintiffs herein are arguing for strict scrutiny and Defendants, while not specifically addressing the appropriate level of scrutiny, have implicitly argued for rational basis review.[21]

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[21] Defendants assert Rule XVII "falls within the valid and legitimate exercise of the State's public safety and policy powers." Defendants' Motion to Dismiss at 17 n.10. Such a justification is consistent with rational basis review. At oral argument, defense

Although the United States Supreme Court has repeatedly used strict scrutiny to invalidate state laws applying classifications based upon alienage, none of those cases involved temporary, nonresident aliens such as Plaintiffs herein.[22] Rather, in all cases where the Court applied strict scrutiny, the affected aliens were ***permanent resident*** aliens. *See, e.g., Bernal v. Fainter*, 467 U.S. 216, 220 n. 6, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984) (invalidating a state law precluding permanent resident aliens from becoming notaries); *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973) (invalidating a state law precluding permanent resident aliens admission to the state bar). Although the equal protection challenge in *Toll v. Moreno*, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982), involved a nonresident (non-immigrant) alien, the Court expressly declined to consider the case on equal protection grounds opting instead to strike the law based on preemption.[23]

However, in his dissenting opinion, then Justice Rehnquist discussed how the fundamental differences be-

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counsel confirmed Defendants' position that rational basis review should apply.

[22] It is now widely accepted that federal laws creating classifications based upon alienage need only satisfy rational basis review. *Abreu v. Callahan*, 971 F. Supp. 799, 810 (S.D.N.Y. 1997) (citing *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)). In other words, classifications among aliens that are wholly permissible for Congress to make are for the most part off limits to the states. *See Takahashi*, 334 U.S. at 418-19, 68 S.Ct. at 1142.

[23] One commentator has suggested that the Court's choice of the preemption analysis in *Toll* was a product of the Court's hesitation to apply strict scrutiny to categories of non-resident aliens. Linda S. Bosniak, *Membership, Equality & the Difference That Alienage Makes*, 69 N.Y.U. L.Rev. 1047, 1149 n. 251 (1994). The district court in *Toll* had applied strict scrutiny.

tween permanent resident aliens and non-resident aliens should preclude the Court's ever applying strict scrutiny analysis where non-immigrants are involved. *Toll*, 458 U.S. at 25, 102 S.Ct. at 2990 (Rehnquist, J., dissenting). The crux of his argument was that resident aliens are so much like citizens that distinctions among them should be carefully scrutinized.[24] *Id.* at 45, 102 S.Ct. at 3000. Non-immigrant aliens, on the other hand, are sufficiently different from citizens and immigrant aliens in relevant respects that distinctions between then should not call for heightened scrutiny. *Id.* Since *Toll*, the Supreme Court has not yet decided the applicable level of scrutiny applicable to non-resident aliens. Lower court opinions have gone both ways without an in depth analysis as to why strict scrutiny was or was not applied. *See, e.g., Ahmed v. University of Toledo*, 664 F.Supp. 282 (N.D. Ohio 1986) (applying rational basis review); *Tayyari v. New Mexico State Univ.*, 495 F.Supp. 1365 (D.N.M. 1980) (applying strict scrutiny).

At oral argument, Plaintiffs' counsel argued that strict scrutiny should be expanded to include temporary non-resident aliens because there are no reasonable differences between resident and non-resident aliens. Therefore, Plaintiffs argued, all lawful aliens should comprise a suspect class.

Perhaps all lawful aliens should comprise a suspect class. However, the current state of the law is that the United States Supreme Court has not yet treated non-immigrant aliens as a suspect class. In *Toll* the Court had the opportunity but chose, not to do so. Instead the Court decided the case on much narrower grounds. Since the U.S. Supreme Court

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[24] Even Justice Brennan, who authored the majority opinion in *Toll*, noted that "when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of [the principles applicable to resident aliens] is likely to be a matter of some dispute." *Toll*, 458 U.S. at 13, 102 S.Ct. at 2984.

chose not to expand strict scrutiny status to non-immigrant aliens, this Court finds no basis to do so. The Supreme Court reluctantly creates new suspect classes because each new expansion involves the invalidation of virtually every classification bearing upon the newly created suspect class. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318, 96 S.Ct. 2562, 2569, 49 L.Ed.2d 520 (1976) (Marshall, J., dissenting).

Moreover, the Supreme Court's rationale for applying strict scrutiny to resident aliens was largely based on the compelling similarities between permanent resident aliens and citizens. *See Griffiths*, 413 U.S. at 722, 93 S.Ct. at 2855; *Nyquist v. Mauclet*, 432 U.S. 1, 12, 97 S.Ct. 2120, 2126-27, 53 L.Ed.2d 63 (1977). Given the similarities between citizens and resident aliens, state-based distinctions among them merit strict scrutiny. However, non-immigrant aliens differ from immigrant aliens and citizens in a fundamental respect — they are admitted to this country on a temporary basis and for limited purposes. Thus, this Court finds no strict scrutiny to be inapplicable in this case.

The more difficult question is whether rational basis review should apply or perhaps some intermediate or heightened level of scrutiny that falls somewhere along the strict scrutiny/rational basis review extremes. The United States Supreme Court or even the Fifth Circuit might very well alight on some middle ground analysis given how solicitous the Supreme Court has been of protecting resident aliens. This Court, however, declines the invitation to create a new quasi-suspect class or foray into the "intermediate scrutiny thicket." The Court therefore opts for rational basis review.

Defendants argue that Rule XVII, Section 3(B) passes rational basis review because the Louisiana Supreme Court has a legitimate interest in insuring that litigants in the state's courts are represented not only by competent lawyers but by lawyers who are not subject to having their residency re-

voked on relatively short notice, or at best lawyers who are only in this country temporarily. Defendants point out not only the potential disruption to the courts' dockets but also the prejudice that clients could suffer if a lawyer is forced to leave the country in the midst of litigation or perhaps even a trial. Surely, both parties are aware that litigation can span years and might often times last longer than the time Congress would allow a temporary alien to remain in the United States. A client's representation is therefore subject to disruption for reasons completely beyond the lawyer's control — reasons of which the client might very well be unaware when he retains counsel.

At oral argument, defense counsel pointed out the near impossibility of tracking down client files, evidence, etc. should a non-resident alien be forced to leave the United States on unfavorable and sudden terms. Counsel posited that the Louisiana Supreme Court would lack any type of disciplinary recourse against an alien lawyer once deported and outside of any state bar's jurisdiction.

Unarguably, the Defendants' proffered reasons do satisfy rational basis review. Rule XVII, Section 3(B) is clearly related to Defendants' legitimate interest in insuring that litigants are represented by counsel who will be in this country when those litigants finally have their day in court. Consequently, Plaintiffs' motion for summary judgment is DENIED on the equal protection claim.

C. Federal Preemption

Plaintiffs argue that Rule XVII is invalid because only the United States has the exclusive power to establish rules governing immigration, foreign policy, and the rights of non-citizens, and that this power is binding on the states by way of the Supremacy Clause.

The authority to control immigration, that is to admit or exclude aliens, is vested solely in the federal government.

Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416, 68 S.Ct. 1138, 1141, 92 L.Ed. 1478 (1948) (citing *Fong Ye Ting v. United States*, 149 U.S. 698, 713, 13 S.Ct. 1016, 1022, 37 L.Ed. 905, 913). The Constitution grants the states no authority over immigration matters. *Id.* at 419, 68 S.Ct. at 1142. Thus, state laws which impose "discriminatory burdens" upon the entrance or residence of aliens lawfully within the United States are in conflict with federal law and are therefore invalid. *Id.* In such a situation, the Supremacy Clause dictates that federal law must prevail. *See Toll v. Moreno*, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982); U.S. Const. art. VI, cl. 2.

However, every state enactment which in any way deals with aliens is not necessarily a regulation of immigration and thus per se pre-empted by federal law. *DeCanas v. Bica*, 424 U.S. 351, 354, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976). In other words, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* A regulation of immigration is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. *Id.* If the regulation or statute does not regulate immigration, then the court will determine whether the regulation or statute conflicts with federal law. If no conflict exists, then there is no preemption. *Id.* at 356-58, 96 S.Ct. at 936-38. However, even where no direct conflict exists, state laws will be preempted where they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the [immigration laws]." *Id.* at 363, 96 S.Ct. at 940. Simply said, states have no power to "add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States." *DeCanas*, 424 U.S. at 358 n.6, 96 S.Ct. at 938.

In *Toll*, the Supreme Court invalidated Maryland's policy of denying non-immigrant aliens the ability to obtain "in-

state" status for purposes of reduced tuition and fees. 458 U.S. at 10, 102 S.Ct. at 2982. The state had argued that the higher fees were an appropriate measure to make up the Congressional tax breaks given to certain aliens. The court concluded that Maryland's practice of charging higher tuition and fees to the non-immigrant aliens frustrated Congress's policy of giving state tax breaks to G-4 visa holders. *Id.* at 16, 102 S.Ct. at 2985-86. The Court was persuaded that a state could not recoup indirectly from the non-immigrants what the federal government had expressly barred the state from collecting. *Id.* The crux of the *Toll* holding is that a state cannot regulate aliens in such a way so as to deprive aliens of benefits and advantages that Congress specifically intended for those aliens to have while residing in this country.

Supreme Court Rule XVII, Section 3(B) has no arguable relevance or impact on who is admitted into the United States. Plaintiffs argue that the Rule is nevertheless a regulation of immigration because it regulates the conditions under which a legal entrant may remain in this country. Plaintiffs' argument is unpersuasive because it requires a far broader interpretation of "conditions under which an [alien] may remain" that what the Supreme Court's jurisprudence would allow. Under Plaintiffs' argument, any state law that affected aliens would be a regulation of immigration. However, the United States Supreme Court expressly rejected that suggestion in *DeCanas v. Bica, supra.* A more likely reading of "conditions under which an [alien] may remain" would be one encompassing laws that affect an alien's ability to remain in a specific jurisdiction. For instance, no state could enact a law requiring deportation based upon the alien's conduct within the state. Such a law would clearly be one setting conditions under which an alien could remain in the jurisdiction, and such a law would surely be invalid. Rule XVII does not set conditions under which an alien may remain in

this country or this state and it is therefore not a regulation of immigration subject to *per se* preemption.

Further, Plaintiffs cite no specific conflicts between Rule XVII and federal immigration law or Congressional policy. *Toll* and *DeCanas* demonstrate that Congress has not preempted the field of law applicable to aliens. Thus, absent a law being a regulation of immigration, a true conflict must exist between the challenged regulation and Congressional policy. At the very least, the challenged regulation must in some way frustrate Congress's policy regarding aliens in order for preemption to apply. Looking to the types of visas pursuant to which Plaintiffs reside in the United States, the Court can discern no such tension between Rule XVII and federal immigration law.

Leclerc, Jarry, and Boulard entered and remain in the United States pursuant to J-1 visas, also known as exchange visas.

> J-class aliens are those aliens having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training....

8 U.S.C. § 1101(a)(15)(J).

Affleck entered and r ins in the United States pursuant to an L-2 visa. An L-2 vis issued to the spouse of an L-1 visa holder. Affleck's spouse is an L-1 class alien which is an alien

> who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation . . . and who seeks to enter the United States temporarily in order to continue to render his services to the same employer . . . in a capacity that is managerial, executive, or involves specialized knowledge. . . .

8 U.S.C. § 1101(a)(15)(L).

J-visas and L-visas are therefore temporary by design. At oral argument counsel informed the Court that J-visas usually entail an eighteen month or so stay in the United States. Affleck has a temporary Employment Authorization Document ("EAD") and has applied for a permanent one.

At oral argument, Plaintiffs argued that Rule XVII, Section 3(B) is inconsistent with the advantages Congress bestowed on them by virtue of their respective immigration visas. The Court disagrees given that the sole effect of Rule XVII upon Plaintiffs is that they cannot obtain licenses to practice law. Leclerc, Jarry, and Boulord can do everything enumerated in the definition of J-class aliens without a license to practice law. Moreover, the practice of law as a licensed attorney lacks congruency with the other teaching and research oriented aspects of J-classification. The inability to obtain a law license simply does not pose an obstacle to Plaintiffs' ability to obtain any of the benefits and advantages associated with having a J-visa. Consequently, a federal preemption does not apply.

Affleck's situation presents a wholly uncompelling argument given that she is in the United States pursuant to a spousal L-2 visa. Again, preemption is not applicable.

Takahaski v. Fish & Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948), does not compel a different result. *Takahashi* invalidated on preemption grounds a

provision of California law that banned the issuance of fishing licenses to "any person ineligible to citizenship." Takahashi was a resident alien[25] who had earned a living as a fisherman for nearly thirty years when California sought to exclude all aliens from obtaining fishing licenses. The Court began its analysis by explaining the vast differences in the ability of the federal and state governments to regulate alien activities — a principle that is now well-established in the law. *See* note 22 *supra*. In striking the California statute, the Court concluded that the state's attempt to prevent lawful aliens from earning a living was tantamount to expelling them because an alien cannot live where he cannot work.[26] *Id.* at 416-19, 68 S.Ct. at 1141-42 (quoting *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915)).

In contrast, Rule XVII does not affect aliens who permanently reside in the United States. Rather, Rule XVII affects temporary aliens who are not in this country to pursue long term, life sustaining employment. Plaintiffs are permitted to earn a living; however, they cannot represent litigants as licensed attorneys at law. The concerns at issue in *Takahashi* are simply not present in this case.

Accordingly, Plaintiffs motion for summary judgment is DENIED on the preemption issues.

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[25] At oral argument, Affleck asserted that Takahashi was a non-immigrant alien. The case is silent as to Takahashi's status but the Supreme Court mentioned in the opinion that Takahashi became a resident of California in 1907. The *Takahashi* decision was rendered in 1948. The Court seriously doubts that Takahashi was a non-immigrant alien.

[26] *Takahashi* was also decided against the backdrop of racial discrimination targeted at persons of Japanese ancestry during and after World War II.

D. Affleck's NAFTA Claim

Affleck asserts that she is in a special category of non-immigrant aliens in that she is a professional certified by a member of the Northern American Free Trade Agreement ("NAFTA"). Affleck asserts that Article 1202 of NAFTA requires that "service providers" be treated in a manner "no less favorable than the treatment of local service providers "in the same circumstances." She asserts that Defendants' actions are a clear breach of that mandate. She argues that the spirit of NAFTA clearly directs the destruction of barriers to attorneys working in member states. Therefore, under the Supremacy Clause, Louisiana cannot make laws contrary to NAFTA.

In opposition, Defendants argue that Affleck's NAFTA claims are procedurally defective. NAFTA gives Affleck no private right of action against Defendants to force compliance with NAFTA. Defendants assert that NAFTA provides for enforcement by the Secretary of State and the Attorney General of the United States. Thus, Affleck lacks standing. Further, Affleck offers no support for her implicit assertion that NAFTA preempts the Eleventh Amendment or that NAFTA was meant to preempt well-established state authority over licensing of attorneys.

On December 17, 1992, the leaders of the United States, Mexico, and Canada completed and signed NAFTA. *Made in the USA Foundation v. United States of America*, 242 F.3d 1300, 1302-03 (11th Cir. 2001). On December 8, 1993, Congress passed the NAFTA Implementation Act which approved NAFTA and provided a series of domestic laws to effectuate and enforce NAFTA's provisions. *See* Pub.L. No. 103-182, 107 Stat.2057 (1993), codified at 19 U.S.C. §§ 3301-3473.

Section 102 of the Implementation Act is entitled "Relationship of the Agreement to the United States and State

Law." Section 102(b) ("Relationship of the Agreement to State law"), subpart (2) ("Legal Challenge"), provides:

> No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, ***except in an action brought by the United States*** for the purpose of declaring such law or application invalid.

19 U.S.C. § 3312(b)(2) (emphasis added).

Furthermore, subsection (c) ("Effect of the Agreement With Respect to Private Remedies"), provides:

> ***No person other than the United States —***
>
> (1) shall have any cause of action or defense under —
>
> (A) the Agreement or by virtue of Congressional approval thereof, or
>
> * * * * * *
>
> (2) may challenge, in any action brought under any provision of law, any action or inaction by . . . any State . . . on the ground that such action or inaction is inconsistent with the Agreement ....

19 U.S.C. § 3312(c) (emphasis added).

In light of the foregoing provisions of the NAFTA Implementation Act, the Court concludes that Affleck lacks standing to challenge Rule XVII based upon any purported conflict with NAFTA. Affleck's claim is an attempt to invalidate a state law due to its inconsistency with NAFTA. NAFTA's enabling legislation expressly limits such a legal challenge to the United States. The Enabling legislation compels the conclusion that Affleck lacks standing to challenge Rule XVII based upon any purported conflict with

NAFTA. Defendants' motion to dismiss is GRANTED with respect to Affleck's NAFTA claim.

Accordingly;

IT IS ORDERED that Defendants Motion to Dismiss (Rec. Doc. 18) should be and is hereby DENIED IN PART AND GRANTED IN PART as detailed in this Order and Reasons;

IT IS FURTHER ORDERED THAT the Motion for Summary Judgment (Rec.Doc. 12) filed by plaintiffs Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck should be and is hereby DENIED and Plaintiffs' complaint is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiffs' Appeal of the Order of the Magistrate Judge Granting a Protective Order and Staying All Discovery (Rec.Doc. 25) should be and is hereby DENIED AS MOOT.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Karen Leclerc; Guillaume Jarry;
Beatrice Boulord; Maureen D. Affleck,
Plaintiffs - Appellants - Cross Appellees,

v.

Daniel E. Webb, et al.
Defendants

Daniel E. Webb; Harry J. Phillips, In Their Respective Official Capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions; Jeffrey P. Victory; Jeannette Theriot Knoll; Chet D. Traylor; Catherine D. Kimball, a/k/a Kitty Kimball; John L. Weimer; Bernette Joshua Johnson, In Their Official Capacities as Justices of the Louisiana Supreme Court,
Defendants - Appellees - Cross Appellants.

Docket No. 03-30752

Caroline Wallace; Emily Maw,
Plaintiffs - Appellees,

v.

Pascal F. Calogero Jr., in his official capacity as Chief Justice of the Louisiana Supreme Court; Jeffrey P. Victory; Jeannette Theriot Knoll; Chet D. Traylor; Catherine D. Kimball; John L. Weimer; Bernette J. Johnson, in their official capacities as Justices of the Louisiana Supreme Court; Daniel E. Webb; Harry J. Phillips, Jr., in their

respective official capacities as Chairman and
Vice-Chairman of the Louisiana Committee on Bar
Admissions,
Defendants - Appellants

Docket No. 03-31009

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC
(Opinion 8/18/05, 5th Cir.)

[Filed March 27, 2006]

Before JONES, Chief Judge, and SMITH, and STEWART, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and who are not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, joined by KING, DAVIS, WIENER, BENAVIDES, STEWART, and DENNIS, Circuit Judges, dissenting from the denial of rehearing en banc.

I respectfully dissent from the Court's refusal to consider en banc the important issues in this case. The panel majority rejects strict scrutiny on the basis that these "nonimmigrant aliens," whatever that means, are not as "discrete and insular" as the "permanent resident aliens" afforded suspect classification by the Supreme Court. It reaches that result by

judicially crafting a subset of aliens, scaled by how it perceives the aliens' proximity to citizenship. This is a bold step not sanctioned by Supreme Court precedent.

For decades, many have argued that it is the classification of aliens as an insular minority that is suspect. The criticism comes in two forms. To some, the unique federal interest in regulating aliens offers a superior rationale for strict scrutiny than the aliens' insular status. As the Supreme Court has recognized, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal government."[1]

To others, the insular status of aliens exists only as a consequence of valid federal law, making strict scrutiny of alienage classifications never appropriate. The contention strikes twice. First, it contends that the alien's limited political role cannot support their treatment as an insular minority. This, because the very admission of the alien is by legislation that defines his role in the political community, subject only to constitutional constraints upon the exercise of that federal power. Second and relatedly, given the supreme federal regulatory power over matters of immigration, the status of persons admitted in conformity with federal law is by definition not immutable. To the point, this criticism is leveled at the claimed insular minority status of *all* aliens lawfully in the country. It draws no distinction between a particular alien's connection to citizenship or subsets of lawfully admitted persons. Rather, it rejects strict scrutiny without regard to the aliens' proximity to citizenship, the relevant factor for discrete and insular minority status under *Carolene Products*.

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[1] *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (holding that the Supreme Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders" and collecting cases to that effect).

Resting strict scrutiny on the insular minority status of legally admitted aliens has its weaknesses. But none support the panel opinion and, in any event, each has been rejected by the Supreme Court. As for the trumping constitutional power of the federal government in controlling the nation's borders, including matters of immigration and naturalization, an allocation that the Supreme Court has pointed to as itself demanding strict scrutiny of state regulations of persons whose presence in the country is lawful under federal law, the panel majority is silent — a silence made the more puzzling by its rationale that this "category" of alien has such a limited tenure in the United States under the conditions of federal law admitting them that their state regulation should not be subjected to strict scrutiny. This is exactly backwards. As the federal constraints are increased, the regulatory field for states is decreased.[2] As federal judicial draws distinctions between different classes of aliens, applying strict scrutiny to some and rational-basis review to others, it shifts responsibility over aliens from the Congress to the States. This is perverse. The panel majority relaxes scrutiny of state regulation of aliens as the federal regulation of them is increased. This is too ambitious for me.

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[2] *Mathews*, 426 U.S. at 81; *see also Graham v. Richardson*, 403 U.S. 365, 378 (1971) ("[States] . . . can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States. . . . State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been more invalid." (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 417 (1948))).

CARL E. STEWART, Circuit Judge, with whom KING, HIGGINBOTHAM, WIENER and DENNIS, Circuit Judges, join dissenting from the denial of rehearing en banc.

I dissent from the court's denial of rehearing en banc in this case involving the rights of alien law school graduates to be admitted to practice law in the State of Louisiana. For the reasons more fully detailed in my dissenting opinion from the panel majority's holding,[1] I reject the panel majority's creation of a new classification of "nonimmigrant aliens," a distinction the Supreme Court has never drawn when discussing the alien suspect class, and its application of rational basis review to laws targeting this class. The matter at issue is clearly enbancworthy because of the far reaching consequences of the panel's holding. I continue to maintain that the plaintiffs in this case, who are lawfully admitted aliens residing in the United States, are part of the alien suspect class and that, therefore, laws that discriminate against them are inherently suspect and should be subjected to strict scrutiny. Accordingly, I dissent from the full court's failure to vacate the panel opinion and hear the case anew. Moreover, I fully concur in the persuasive opinion dissenting from the denial of rehearing en banc penned by Judge Higginbotham.

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[1] *LeClerc v. Webb*, 419 F.3d 405, 426-31 (Stewart, J., concurring in part and dissenting in part).